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**Supreme Court of the United States**

**OCTOBER TERM, 1940**

**No. 558.**

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**R. H. NYE AND L. C. MAYERS, PETITIONERS,**

**vs.**

**THE UNITED STATES OF AMERICA AND W. B.  
GUTHRIE**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE FOURTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED NOVEMBER 7, 1940.**

**CERTIORARI GRANTED DECEMBER 23, 1940.**

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vs.

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## INDEX

	Original	Print
Record from D. C. U. S., Middle District of North Carolina..	1	1
Caption ..... (omitted in printing) ..	1	
Complaint .....	2	1
Amendment to complaint .....	5	3
Answer .....	8	5
Answer to amendment to complaint.....	11	7
Testimony of W. H. Elmore at hearing on motion to dis- miss .....	12	7
Order to show cause, citing Nye and Mayers.....	14	8
Motion of Wm. B. Guthrie for order to show cause.....	15	9
Affidavit of Wm. B. Guthrie .....	20	13
Motion by respondent, L. C. Mayers, to strike out service of rule .....	21	13
Motion by respondent, R. H. Nye, to strike out service of rule .....	23	14
Amendment to motion by respondent L. C. Mayers.....	25	15
Amendment to motion by respondent R. H. Nye.....	26	16
Minutes showing denial of motions and exceptions.....	27	16
Answer of L. C. Mayers.....	28	17
Answer of R. H. Nye .....	33	20

Record from D. C. U. S., Middle District of North Carolina—Continued		Original	Print
Judgment of non-suit.....	39	25	
Statement of evidence.....	40	25	
Caption and appearances... (omitted in printing)...	40		
Evidence offered by movant:			
Testimony of T. D. Wolf (omitted in printing)...	46		
T. A. Morris (omitted in printing)	52		
W. H. Elmore .....	56	26	
Henry Elmore .....	107	57	
D. J. Howard .....	112	61	
C. T. Council, Jr. (omitted in printing) .....	118		
C. T. Council, Sr. (omitted in printing) .....	122		
Germain Bernard (omitted in printing) .....	127		
W. J. Croom (omitted in printing) .....	128		
Respondent's motion to dismiss.....	130		
Evidence offered by respondents:			
Testimony of Annie McLean.....	131	65	
Mattie Jenkins .....	143	73	
L. C. Mayers .....	150	77	
W. E. Timberlake.....	158	82	
L. C. Mayers (recalled) .....	169	89	
Tillman Hardy .....	193	104	
Mr. Harris .....	202	109	
E. G. Baldwin .....	207	112	
Mrs. E. G. Baldwin .....	214	116	
Mr. Barnes .....	218	119	
G. V. Jennings .....	223	123	
Eugene Nye .....	228	126	
F. R. Bell .....	232	128	
Mack Kenlaw .....	240	133	
Howard Nye .....	243	135	
Renewal of respondents' motion to dismiss.....	271	153	
Stipulation re testimony of W. E. Caldwell (omitted in printing) .....	272		
Findings of fact and judgment .....	273	153	
Exceptions by respondents to findings of fact and judgment .....	277	158	
Oral order taxing respondents with witness fees and mileage for W. H. Elmore (omitted in printing).....	278		
Subpoena for W. H. Elmore.... (omitted in printing) ..	279		
Marshal's return .....	279		
Statement of points to be relied on by appellants.....	280	159	
Notice of appeal .....	287	165	
Supersedeas and appearance bond (omitted in printing) .....	289		
Bond for costs on appeal..... (omitted in printing) ..	291		
Stipulation as to contents of record (omitted in printing)	293		

# INDEX

iii

## Record from D. C. U. S., Middle District of North Carolina—Continued

	Original	Print
Order to transmit record.....(omitted in printing) ..	295	
Clerk's certificate .....(omitted in printing) ..	295	
Proceedings in U. S. C. C. A., Fourth Circuit.....	296	166
Docket entries .....	296	166
Opinion, Soper, J. ....	298	168
Judgment .....	306	173
Issuance of mandate .....	306	173
Order recalling mandate, etc. ....	307	174
Clerk's certificate .....(omitted in printing) ..	308	
Order allowing certiorari .....	308a	175
Stipulation as to printing of record .....	309	175

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[fols. 1-2]

**IN UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF NORTH CAROLINA, DURHAM DIVISION, AT LAW**

**W. H. ELMORE, Administrator of James Elmore, Deceased,**

**vs.**

**C. T. COUNCIL and GERMAIN BERNARD, Partners Trading as BC Remedy Company**

**COMPLAINT—Filed March 18, 1939**

The plaintiff complains and alleges:

1. That he is a citizen and resident of Horry County, State of South Carolina, and is the duly qualified and acting Administrator of the estate of his son James Elmore, who died at Lumberton, North Carolina, on November 4th, 1936, and the defendants are citizens and residents of the State of North Carolina, Middle District thereof, residing at Durham, North Carolina; that the amount in controversy herein exceeds, exclusive of interest and costs, the sum of \$3000.00.

2. That at the times hereinafter mentioned the defendants were copartners and the owners and manufacturers of a certain proprietary medicine in powder form which they advertised and sold under the name of "BC" to drug stores, soda fountains, filling stations, cafes, restaurants and grocery and general stores for resale to the public and they advertised the same in newspapers and other periodicals and by radio as a cure for headaches, neuralgia and other aches and pains and otherwise, and in the directions upon the packages in which the preparation and/or powders were sold and otherwise, they fraudulently, falsely, deceitfully, negligently, and knowingly represented the medicine or preparation to be safe and reliable for use by human beings without depressing or bad after effects, harmless and non-habit-forming, and that it might be taken by human beings, including plaintiff's intestate, with the assurance that it contained no opium or narcotics and that it was safe for use [fol. 3] by human beings, including said intestate, whereas in truth and in fact the said proprietary BC medicine and/or powders contained chemical substances or drugs known re-

spectively as acetanilide, bromide of potassium, aspirin and caffen; that said medicine powders or preparation is a lethal compound, and is poisonous, habit-forming and death-dealing in its effects when consumed and taken by human beings, and through the fraud and deceit and negligence of defendants James Elmore became a user of said medicine and/or powders and an addict thereto and as a result thereof was finally killed at the age of early manhood from the use of the same, and prior to becoming a user of and an addict thereto he was a healthy and vigorous man able to do hard work and earn money.

3. That the said BC preparation or remedy is put up in powder form and at the times hereinafter complained of each powder contained approximately 4 grains of acetanilide, 10 grains potassium bromide, 5 grains aspirin and 1 grain caffen citrate, the same being in accordance with a formula used in the preparation, manufacture and sale thereof by the defendants.

4. That the defendants wrongfully, unlawfully, deceitfully, negligently and knowingly failed in labelling said BC medicine or preparation to reveal facts material with respect to the consequences which might result from the use of the same under conditions of use prescribed in the labelling thereof, and to bear warnings to intestate and the public against use in those pathological conditions or against unsafe dosage or duration of administration.

5. That acetanilide is a powerful, dangerous and harmful drug and should be administered to or taken by human beings with safety only upon the direction of or under the supervision of a physician or a person learned in the science of medicine.

6. That within one year from the death of plaintiff's intestate the plaintiff as his Administrator brought an action [fol. 4] to recover damages against the defendant in the Superior Court of Robeson County, North Carolina, and on the 14th day of March, 1939, submitted to a voluntary non-suit and the action pending in Robeson County Superior Court was dismissed as of judgment of voluntary non-suit, and this action has been begun within one year from said date of voluntary non-suit.

7. That by reason of the fraud, deceit and negligence of defendants, and their wrongful-y negligent, wanton and reck-

less indifference to the health, happiness and lives of the general public including plaintiff's intestate, and with full knowledge (both of the defendants being registered pharmacists) which was the proximate cause of the death of plaintiff's intestate, the plaintiff has been greatly damaged, to-wit: in the sum of Thirty Thousand Dollars (\$30,000.00).

Wherefore plaintiff prays judgment that he have and recover of the defendants the sum of \$30,000.00, and for the costs of this action and for such other and further relief as he may be entitled to.

Wm. B. Guthrie, Attorneys for Plaintiff.

*Duly sworn to by W. H. Elmore. Jurat omitted in printing.*

[fol. 5]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO COMPLAINT—Filed April 13, 1939

By way of amendment and addition to his complaint the plaintiff is informed and believes and alleges:

3½ That (a) acetanilide is a powerful, dangerous and harmful drug, and should be administered to or taken by human beings with safety only upon the direction and supervision of a competent physician or person learned in the science of medicine; (b) that the use of acetanilide by human beings unless taken under the direction of a competent physician or person learned in the science of medicine, if taken through a period of time will produce acetanilide poisoning and eventually death, and will produce cyanosis of the face, lips and tongue, and in addition to cyanosis an addiction, emancipation anemia; that (c) said BC powders are inherently dangerous to human beings and health; and (d) it is and was negligence on the part of the defendants who are registered pharmacists, and who knew or ought to have known the effect of acetanilide on human beings, not to place in their advertisements and in or on the envelopes containing said BC powders a warning to consumers including plaintiff's intestate of the said powders that they might become habit forming and dangerous if used too freely or too frequently; that (e) bromide of potassium, except when



taken upon the directions and under the direction of a competent physician or person learned in the science of medicine, is likewise dangerous to human life, and is a habit-[fol. 6] forming drug; and (f) that a combination of acetanilide and bromide of potassium as contained in said BC powders is a narcotic, and said BC powders will cause acute dilation of the heart and destroy the red corpuscles of the blood and if used by human beings for any length of time will produce death, and said powders did produce and cause the death of plaintiff's intestate; that (g) the advertisements, both on the envelopes containing BC powders and in the newspapers, magazines and radio, used and published and advertised by the defendants were false and intended and calculated to deceive and did and does deceive the ultimate purchasers of and users of said BC powders, including the plaintiff's intestate, and it is and was negligence on the part of defendants in their failure to advertise, print and publish on the envelopes containing the aforesaid powders a caution that said powders are and were dangerous and habit forming and should be used and consumed by human beings with caution and care; that (h) it is and was negligence on the part of the defendants to manufacture, compound, market and sell the aforesaid powders without fully disclosing the presence therein of the ingredients or drugs other than acetanilide—the disclosure of the presence of acetanilide therein made by defendants was solely to escape the pains and penalties incident to their failure to do so under the Acts of Congress of the United States and the statutes of North Carolina in such cases made and provided, and (i) it was negligence on the part of the defendants to direct that said powders could be taken in accordance with the instructions on the envelopes containing the powders, and in accordance with their advertisements in the newspapers, magazines and radio; that (j) the advertisements on the envelopes containing the said BC powders was a misbranding thereof under the pertinent statutes of North Carolina, particularly Section 4760 of the Consolidated Statutes of North Carolina, and this was gross negligence, fraud and deceit on the part of defendants.

Wm. B. Guthrie, Attorney for Plaintiff.

[fol. 7] *Duly sworn to by Wm. B. Guthrie. Jurat omitted in printing.*



[fol. 8]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed April 29, 1939

The defendants, answering the complaint filed herein, say:

1. They admit that they are citizens and residents of the State of North Carolina, Middle District thereof, residing at Durham, North Carolina, and that the amount for which this suit is brought exceeds, exclusive of interest and costs, the sum of \$3,000.00. They have no knowledge or information sufficient to form a belief as to the residence and citizenship of the plaintiff, the death of James Elmore, the place and date of his death, or the qualification of the plaintiff as the Administrator of said estate, and therefore deny these allegations. They are informed and believe, and therefore allege, that if the plaintiff is a citizen and resident of Horry County, State of South Carolina, as alleged in paragraph 1 of the complaint, he is not the lawful administrator of the estate of James Elmore, has no legal right to maintain this action, and the defendants pray the Court that this action be dismissed.

2. They admit that on Nov. 4, 1936, and prior thereto, they were co-partners and owners and manufacturers of a proprietary medicine in powder form sold under the name of "B. C.". They admit that "B. C." contains drugs known, respectively, as acetanilid-, bromide of potassium, [fol. 9] aspirin, and caffeine. They have no knowledge or information sufficient to form a belief as to the allegations of paragraph 2 of the complaint that the plaintiff's intestate became a user of "B. C." or as to his age, his death, the cause of his death, the condition of his health, what work, if any, he was able to do, or what his earning capacity was, and therefore deny the allegations with reference thereto. Except as herein admitted or otherwise denied, paragraph 2 of the complaint is denied.

3. Paragraph 3 of the complaint is admitted.

4. Paragraph 4 of the complaint is denied.

5. Paragraph 5 of the complaint is denied.

6. Upon information and belief, paragraph 6 of the complaint is admitted.

7. The allegations in paragraph 7 of the complaint that the defendants are registered pharmacists is admitted. Except as herein admitted, paragraph 7 of the complaint is denied.

And the defendants deny that any of the things complained of in the complaint are the result of the use of any of their product or of anything done or omitted to be done by them.

The defendants, further answering the complaint filed herein, upon information and belief allege and say:

1. That the District Court of the United States for the Middle District of North Carolina lacks jurisdiction over the subject matter of this action.

2. That the District Court of the United States for the Middle District of North Carolina lacks jurisdiction over the person of the plaintiff in this action.

3. That the complaint filed herein fails to state a claim upon which relief may be granted.

Wherefore, having fully answered, the defendants pray that this action be dismissed and that they go hence without day and recover their costs.

Fuller, Reade, Umstead & Fuller, Attorneys for the Defendants.

[fol. 10]

#### DEMAND FOR JURY TRIAL

The defendants, without waiving any of the defenses set up in this answer and their motions to dismiss this action, demand a trial by jury of the issues of fact raised by the pleading herein, in the event the Court shall over-rule or deny said motions.

Fuller, Reade, Umstead & Fuller, Attorneys for the Defendants.

*Duly sworn to by C. T. Council. Jurat omitted in printing.*

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO AMENDMENT TO COMPLAINT—Filed April 29,  
1939

The defendants, answering the amendment to the complaint filed herein, say:

3½. The allegations contained in said amendment to the complaint are untrue and the same are therefore denied.

Wherefore, having fully answered, the defendants pray that this action be dismissed and that they go hence without day and recover their costs.

Fuller, Reade, Umstead & Fuller, Attorneys for Defendants.

*Duly sworn to by C. T. Council. Jurat omitted in printing.*

[fol. 12] IN UNITED STATES DISTRICT COURT

TESTIMONY OF W. H. ELMORE

. In a hearing before the presiding Judge at Durham, N. C., on a motion filed August 29, 1939, by the defendants, C. T. Council and Germain Bernard, partners, trading as B. C. Remedy Company, to dismiss plaintiff's action on the ground that W. H. Elmore had been discharged as administrator, by the Clerk of Court of Robeson County, and the estate fully administered, which motion was heard, after notice to the parties, on September 29, 1939, and W. H. Elmore having been subpoenaed to appear and testify before the Court, and having appeared and after first being duly sworn, in open Court, testified as follows:

W. H. Elmore: That on the day before April 19th, 1939, L. C. Mayers came to the place where I was at work near Conway, S. C., and gave me some liquor. I was ditching. After talking to me and giving me liquor, he said Mr. R. H. Nye wanted me to come to Lumberton to see him and that Mayers had come after me; that Nye wanted to see me about the case I had in Federal Court against B. C. Remedy Company. He got me intoxicated and persuaded me to go with him to Lumberton right then. He did not want to wait for me to put on clean clothes or notify my daughter, with

whom I then lived and promised to bring me back that afternoon. He took me about sixty miles to R. H. Nye's office in Lumberton and there Nye talked to me and told me there was nothing in the case, that lawyer Carlyle was a good lawyer and he said there was nothing to it; that Nye's daughter had married a son of defendant Council and R. H. Nye was anxious to get the same stopped. He then sent me to his home where I was accompanied constantly by L. C. Mayers, and spent the night, staying with Mayers who continued to supply liquor during the night, and the next morning Mayers turned me over to Nye, who then took me to a lawyer's office where he had me to sign up some papers that I did not understand because of my condition; that Nye took me to the Court House where some other papers were signed but I did not know what they were. He then took me to the Post Office and mailed some papers; that Nye [fol. 13] did not pay or promise to pay me anything. And Nye furnished the lawyer, paid for everything and the postage and then sent me home by Mayers; that during all this time I was intoxicated and did not know what I was doing. I did not know that I had sworn that I had fully administered my son James Elmore's estate, and did not know that I had been discharged as administrator, nor that I had signed a letter and mailed it to the Judge of the Federal Court, asking him to dismiss my case against the B. C. Remedy Company. I did not have a chance to communicate with my lawyer and all this was done while I was intoxicated.

I have no education and my occupation was a cotton mill hand.

I do not want the case stopped but I want it tried.

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[fol. 14]      IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE—Filed September 30, 1939

The attorney for the plaintiff in this case having moved the Court to issue an order to R. H. Nye, and L. C. Meyers (Mayers) to appear before this Court and show cause if any they have, why they should not be adjudged for contempt of court, and it appearing to the Court that W. H. Elmore, on oath testified to facts that, the said R. H. Nye and L. C.



Meyers (Mayers) have been guilty of behavior contemptuous of this Court.

It is now ordered that the said R. H. Nye and L. C. Meyers (Mayers) be and appear before this Court at Durham, North Carolina on the 14th day of October, 1939 at 9 o'clock A. M. and show cause if any they have why they should not be adjudged in contempt of this Court.

The Clerk will certify copies of this order and motion for service on the said respondents.

This the 30th day of September, 1939.

Johnson J. Hayes, United States District Judge.

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR ORDER TO SHOW CAUSE—Filed September 30, 1939

To The Honorable Johnson J. Hayes, United States District Judge:

William B. Guthrie, Esq., attorney of record for the plaintiff appointed by this Court to prosecute this action for and on behalf of the above named plaintiff, through his attorney, E. C. Brooks, Jr., respectfully shows to the Court:

1. That on March 16, 1938 said William B. Guthrie was duly appointed by this honorable Court to prosecute the above entitled action on behalf of W. H. Elmore, administrator of his deceased son, James Elmore, to recover \$30,000.00 damages for the alleged wrongful death of said decedent, alleged to have been caused by fraud, negligence and deceit of the defendants in the manufacture and sale of a lethal and poisonous compound, known as B. C. Powder, for which it is alleged the petitioner's intestate became an addict thereto resulting in his death; that on the 18th day of March, 1938 a duly verified bill of complaint was filed herein.

2. That on the 29th day of August, 1939, the defendants filed of record in said cause a petition to dismiss this action [fol. 16] for that, among other things, W. H. Elmore had been discharged as administrator of the estate of the said intestate and there was no plaintiff to prosecute this action.

3. That upon a hearing had before your Honor at Greensboro, N. C., on July 20, 1939 as will appear from the minutes of the Court entered in this action—the Court investigating the question of what induced the said W. H. Elmore to have himself discharged as administrator and request a dismissal of this action without knowledge or consent of his counsel—Albert Elmore, Esq., testified as follows:

“Albert Elmore testified that he wrote the letter and affidavit in an office in Lumberton, that Mr. Nye assisted him in preparing letters and affidavit; that he went voluntarily to South Carolina with Mr. Guthrie to see his father; that he knew nothing about his father filing final account as administrator.”

“Howard Nye testified that he employed Mr. W. E. Timberlake, attorney, who wrote the letter and affidavit and also prepared the final account of W. H. Elmore as administrator.”

4. That another hearing was had therein at Durham, N. C., on the 29th day of September, 1939, the Court then further pursuing an investigation as to why it was and what inducement was offered to W. H. Elmore to request the Court without the knowledge and consent of his counsel, appointed by the Court, to dismiss this action and to have himself discharged as administrator, the said W. H. Elmore, pursuant to a subpoena served on him by a United States Marshal, in South Carolina, duly appeared in person before the Court at Durham, North Carolina, on said September 29th, 1939 and testified in substance, as follows:

“That a day or two prior to April 19, 1939 and while this action was pending in your honor’s Court—the action having [fol. 17] been instituted on March 18th, 1939—one L. C. Mayers came to the home of said W. H. Elmore near Conway, S. C. and advised him that he was sent to him as agent of R. H. Nye, Esq., of Lumberton, N. C., and on his behalf and that said Nye desired to talk with said Elmore concerning a dismissal of this action then pending in this Honorable Court; that said L. C. Mayers came to said Elmore’s home, near Conway, S. C. where he was working in the field and requested him to go to Lumberton, N. C., for a conference with said R. H. Nye about the matter and he brought with him a supply of liquor and insisted that said Elmore should freely partake of the same, which said Elmore did;

that while under the influence of the liquor supplied by said Mayers said Elmore got into the automobile of the said Mayers who drove him to Lumberton, N. C. directly to the office of R. H. Nye at his place of business at the Nye Oil Company at Lumberton, N. C., where he met said R. H. Nye in person; that said Nye explained to said Elmore, who was then in an intoxicated condition, that his daughter had married the son of the defendant C. T. Council Sr., and he wanted the case dismissed and killed; that said Elmore was then under the influence of liquor so much so that he did not know what he was doing; that said L. C. Mayers was a resident of Robeson County, North Carolina and resided on one of the farms of R. H. Nye and he continued to supply the said Elmore with liquor and took him to a house owned by R. H. Nye where he spent the night and slept in the same bed with the said Mayers who continued to supply him with liquor, and early the next morning, to-wit, on April 19th, 1939 said R. H. Nye presented to said Elmore a typewritten letter addressed to William B. Guthrie, attorney in this action for the plaintiff, asking that said suit be dismissed and this without other notice to said attorney though simultaneous with the signing of said letter and on said date an order, without the knowledge of W. B. Guthrie, Attorney, was entered by the clerk of the superior court of Robe-[fol. 18] son County discharging said Elmore as administrator of the estate of James Elmore; that in addition thereto the said Nye presented to said Elmore for signature a paper which he afterwards learned to be a "final account" and a petition for his discharge as administrator of said intestate, and upon which he has since learned that an order of discharge was made by the Clerk of the Superior Court of Robeson County discharging him as administrator and it was after this that the defendants, as the record will show in this cause, filed in this Court a motion to dismiss this case for there was no plaintiff to continue the prosecution of the same. And at said hearing on September 29th, 1939 the said W. H. Elmore further testified he did not know what he was doing or signing and especially a statement in his affidavit prepared by said Nye for his discharge as administrator "that there was no accounts due by or to the estate" and he further testified that this was not true but was false and he signed and verified the same while under the influence of liquor.



Said W. H. Elmore further testified in open court that he desired to continue to prosecute this action to its final end notwithstanding the fact that the Clerk of Superior Court of Robeson County had on April 19th, 1939, entered an order for his discharge as administrator, which said order was prepared by R. H. Nye and said Elmore was induced to sign while in an intoxicated condition and did not know or appreciate the contents of the same.

Wherefore, William B. Guthrie, attorney as aforesaid, through his attorney, E. C. Brooks, Jr., respectfully moves the Court as follows:

1. That the Court make and issue and order herein requiring R. H. Nye to be and appear before this Court on a [fol. 19] day certain at an hour and place to be fixed by the Court, to show cause, if any, why he should not be attached and held as for contempt of this Court.
2. That the Court call to the attention of the United States District Attorney for this district the entire record in his cause with request to the said United States District Attorney to investigate the question as to whether or not a conspiracy was entered into by and between R. H. Nye, W. E. Timberlake and L. C. Mayers, all of Robeson County, North Carolina, to defeat the administration of justice and the orderly process of this Court and further as to whether or not they have been guilty of subornation of perjury and further whether they conspired to practice a fraud and did practice a fraud upon this Court.
3. That this matter through the office of the United States District Attorney for this district be submitted and inquired into by the Grand Jury for such action and attention the Grand Jury shall deem proper.
4. For such other and further procedure as to this Court may seem proper.

Dated, September 30th, 1939.

Wm. B. Guthrie.

E. C. Brooks, Jr., Attorney for William B. Guthrie.



[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF WM. B. GUTHRIE—Filed Oct. 7, 1939

William B. Guthrie, being duly sworn, says:

That the motion filed in this cause, signed by him, dated September 30th, and filed September 30, 1939, is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to such matters and things he verily believes it to me true;

And affiant prays that this verification be attached to as a part of said petition now on file in the office of the Clerk of the United States District Court, Middle District of North Carolina, Durham Division, in this cause above entitled.

Dated October 6th, 1939.

William B. Guthrie.

Subscribed and sworn to before me this October 6, 1939. Lola W. White, Notary Public. My commission expires May 12, 1941.

[fol. 21] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO STRIKE OUT SERVICE OF RULE—Filed Oct. 30, 1939

Now comes the respondent, L. C. Mayers, and enters a special appearance and moves the Court to strike out the service of the rule herein issued insofar as it relates to this defendant, for that:

1. This respondent, L. C. Mayers, is a citizen and resident of Robeson County, North Carolina, which county is not in the Middle District of North Carolina, but is in the Fayetteville Division of the Eastern District of North Carolina.

2. That none of the things alleged in the motion herein filed were committed, if at all, within the Middle District of North Carolina, but are alleged to have been committed in the State of South Carolina, and in Robeson County,

North Carolina, and — of these allegations relate to matters concerning the Probate Court of Robeson County, North Carolina, and were not to be filed in any other court.

3. That this defendant is advised and believes that he has done nothing within the jurisdiction of this Court and that he has a right to move to discharge the rule and to strike out the service thereof for lack of jurisdiction in this Court without submitting himself to the jurisdiction of this Court.

[fol. 22] Wherefore, the respondent, L. C. Mayers, prays the Court that it proceed no further herein, and to declare that it has no jurisdiction herein, and to strike out for said cause the rule herein issued and the service of the same on this respondent.

T. A. McNeill, Attorney for L. C. Mayers.

*Duly sworn to by L. C. Mayers. Jurat omitted in printing.*

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO STRIKE OUT SERVICE OF RULE—Filed Oct. 30, 1939

Now comes the respondent, R. H. Nye, and enters a special appearance and moves the Court to strike out the service of the rule herein issued insofar as it relates to this defendant, for that:

1. This respondent, R. H. Nye, is a citizen and resident of Robeson County, North Carolina, which county is not in the Middle District of North Carolina, but is in the Fayetteville Division of the Eastern District of North Carolina.

2. That none of the things alleged in the motion herein filed were committed, if at all, within the Middle District of North Carolina, but are alleged to have been committed in the State of South Carolina, and in Robeson County, North Carolina, and all of these allegations relate to matters concerning the Probate Court of Robeson County, North Carolina, and were not to be filed in any other court.

3. That this defendant is advised and believes that he has done nothing within the jurisdiction of this Court and that he has a right to move to discharge the rule and to strike out the service thereof for lack of jurisdiction in this Court without submitting himself to the jurisdiction of this Court.

[fol. 24] Wherefore, the respondent, R. H. Nye, prays the Court that it proceed no further herein, and to declare that it has no jurisdiction herein, and to strike out for said cause the rule herein issued and the service of the same on this respondent.

L. R. Varser, Attorney for R. H. Nye.

*Duly sworn to by R. H. Nye. Jurat omitted in printing.*

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO MOTION—Filed November 17, 1939

Now comes the respondent, L. C. Mayers, and asks permission to file this amendment to his motion to dismiss and pleas to the jurisdiction heretofore filed, and for such amendment says:

1. That the unverified motion filed herein September 30, 1939, upon which the order to show cause herein was issued, is not sufficient to give this Court jurisdiction to issue said order to show cause, or to proceed in this proceeding.

T. A. McNeill, Attorney for L. C. Mayers.

*Duly sworn to by L. C. Mayers. Jurat omitted in printing.*

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO MOTION—Filed November 17, 1939

Now comes the respondent, R. H. Nye, and asks permission to file this amendment to his motion to dismiss and pleas to the jurisdiction heretofore filed, and for such amendment says:

1. That the unverified motion filed herein September 30, 1939, upon which the order to show cause herein was issued, is not sufficient to give this Court jurisdiction to issue said order to show cause, or to proceed in this proceeding.

L. R. Varser, Attorney for R. H. Nye.

*Duly sworn to by R. H. Nye. Jurat omitted in printing.*

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTES SHOWING DENIAL OF MOTIONS AND EXCEPTIONS

October 30, 1939, this cause called for hearing on return day of order to show cause and respondent Nye represented by L. R. Varser, and T. A. McNeill, counsel for the respondent, Mayers.

Motions made by each respondent to dismiss rule to show cause. Motions are denied and each respondent excepts. The Court being of the opinion that the question to be determined is whether the respondents, or either of them, is guilty of misbehavior in the presence of the Court, or so near thereto to obstruct the administration of justice in this Court, and that is a matter of fact to be determined by the evidence and not on motion.

At close of all the evidence each respondent again moves to dismiss. Motion is denied and each respondent excepts.

The Court reserves decision and continues all matters until Friday, November 17th, 1939.

Counsel for all parties to file briefs within ten days from date.



[Title omitted]

## ANSWER OF L. C. MAYERS—Filed October 30, 1939

The respondent, L. C. Mayers, without waiving any matters set forth in his motion heretofore filed now comes, and for his answer to the motion of September 3, 1939, filed by the Hon. William B. Guthrie on said date, says:

1. That this respondent has no knowledge or information in respect to the matters and things set forth in the first paragraph of said motion, except such as is set forth therein.

2. That this respondent has no knowledge or information in respect to the matters and things set forth in paragraph 2 of said motion, except such as is set forth in said paragraph.

3. That this respondent has no knowledge or information in respect to the matters and things set forth in paragraph 3 of said motion, except as disclosed by said paragraph.

4. That this respondent has no knowledge or information as to what was done and said on the twenty-ninth day of September, 1939 at the hearing referred to in paragraph 4 of the said motion, except such information as is therein contained, but this respondent says that the recitals therein purporting to set forth testimony of W. H. Elmore at said hearing is not true as such recitals relate to this respondent [fol. 29] and the same is denied, but the true facts in regard to this respondent's connection with the matters referred to in said testimony are:

That some time during February, 1939, or about that time, respondent in casual conversation with R. H. Nye learned that W. H. Elmore had instituted a suit against certain persons who own what is known as the B-C Remedy Company, makers of headache powders and that that time this respondent advised said Nye that he was well acquainted with James Elmore, the deceased son of W. H. Elmore, before his death and also knew W. H. Elmore well, having become acquainted with these men while operating a store in a mill village near the town of Lumberton. The

said R. H. Nye at that time advised respondent that he was interested in the case because his daughter had married into the family of a Mr. Council who had some interest in said B-C Remedy Company, and he would like to see it ended or stopped; that some two or three weeks thereafter the said R. H. Nye and this respondent were again in conversation about a business matter when respondent mentioned to said Nye that he had seen said W. H. Elmore in Lumberton a few days prior thereto and would likely see the said Elmore again when it was convenient for him to go to Elmore's home, as he had asked Elmore about gum timber in his community and Elmore had invited him to go down and visit him and he would see if there was any timber for sale in that community, and would speak to Elmore about the case.

That on the eighteenth day of April, 1939, respondent went to South Carolina in his automobile for the purpose of talking with the said W. H. Elmore and found said Elmore in a field at work near his home. That after the usual greetings respondent inquired of said Elmore with reference to gum timber that might be in that community, and after discussing that, the said W. H. Elmore himself spoke of the said law suit and said to this respondent that he was much worried about the suit; that it was giving him much concern and trouble and that he was unable both physically and financially to attend to it at such a distance and that he wanted to drop it, and had considerable to say about the [fol. 30] advice that he had received from Mr. Carlyle, a lawyer in Lumberton, with reference to the strength of his case and that he had worried himself nearly to death about the matter, whereupon respondent told said W. H. Elmore that he knew R. H. Nye of Lumberton and that he had talked with said Nye about the suit and that said Nye was interested in the same because his daughter had married into the family of some gentleman who was connected in some way with the B-C Company and that respondent thought that said R. H. Nye would advise with him about the matter. The said W. H. Elmore then requested respondent to take him at once to Lumberton to see the said Nye which this respondent did thinking that he could return home with the said Elmore that night.

That respondent and said W. H. Elmore arrived at the office of said R. H. Nye at Lumberton in the late afternoon where respondent learned that whatever business it was

that Elmore and said R. H. Nye had in mind with reference to said law suit could not be attended to before the next morning because a lawyer could not be had that night, or at least the one that they desired to see. That it was then agreed that respondent and said W. H. Elmore would spend the night at the home of said R. H. Nye and, that said business would be transacted the following morning and this respondent and said W. H. Elmore did spend the night at the home of said R. H. Nye and after having breakfast the next morning at a restaurant operated by a brother of said R. H. Nye, the said W. H. Elmore and the said R. H. Nye left the presence of this respondent and were gone some two or more hours, at the end of which time the said Elmore met respondent at a garage as agreed upon, and respondent carried said W. H. Elmore back to his home in South Carolina.

That respondent did not then nor does he now know anything of court procedure, nor did he know what the said W. H. Elmore and R. H. Nye had in view with reference to said law suit, nor the purport thereof, until after said Elmore and respondent had started back to South Carolina [fol. 31] and to the home of said Elmore, at which time said Elmore advised respondent that he had got rid of the said case and was glad of it for the matter had been worrying him nearly to death for a long time.

That this respondent did not at any time drink any whiskey himself or other intoxicant during any of the time he was with or in the presence of the said W. H. Elmore nor did he drink any intoxicants on either of the days that he was with the said Elmore on said occasion, nor did he give the said Elmore at any time any intoxicating liquors or drinks whatsoever, nor did the said W. H. Elmore drink any intoxicating liquors at any time while in the presence of the respondent and the said W. H. Elmore was perfectly sober at all times from the time respondent first saw him in his field on the eighteenth day of April until respondent left him at his home in South Carolina on the nineteenth day of April.

That this respondent did not do anything whatsoever to induce or persuade the said Elmore to do any act or thing whatsoever with reference to said law suit or with reference to the resignation or discharge of said W. H. Elmore as administrator of James Elmore, nor did he counsel or advise the same, nor did he give the said Elmore any money or thing of value.

5. That this respondent resides in Robeson County, North Carolina which is a part of the Fayetteville Division, of the Eastern District of North Carolina, and that he did not intend to interfere with the administration of justice in this Court, and did not intend any disrespect to this Court, and did not have anything to do with procuring the discharge of W. H. Elmore as administrator of the estate of James Elmore, deceased, and what he did in this entire matter was done purely and solely as a matter of friendship for R. H. Nye, and not with any idea, view or knowledge that his actions were in any way wrongful or could have been considered disrespectful to this Court. That this respondent has since been advised that the Clerk of the Superior Court of Robeson County had full jurisdiction over the administration of the estate of James Elmore, deceased, and discharged the said W. H. Elmore as such administrator, and that the said Clerk did talk with the said Elmore in person and that [fol. 32] those present now say that the said Elmore was sober, or that at least they could not and did not detect any evidence to the effect that he was not sober at the time of said resignation.

Wherefore, this respondent prays that the rule to show cause be discharged and that he be allowed to go hence without day.

T. A. McNeill, Attorney for L. M. Mayers.

*Duly sworn to by L. C. Mayers. Jurat omitted in printing.*

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[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF R. H. NYE—Filed October 30, 1939

Now comes the respondent, R. H. Nye, reserving unto himself all matters set out in his motion heretofore filed and not waiving anything therein for his answer to the motion dated September 30, 1939, filed by William B. Guthrie on said date, says:

1. That this respondent has no knowledge or information in respect to the allegations contained in the first paragraph, except such as is contained in the record in this cause.



2. That this respondent has no knowledge or information in respect to the allegations contained in the second paragraph, except such as is disclosed by the record in this cause.

3. That in answer to the allegations contained in the third paragraph, this respondent has no knowledge in respect thereto, except as follows: That this respondent was served with a subpoena to attend in this cause at Greensboro, North Carolina on a day named in said subpoena, to-wit, 20 July, 1939, and this respondent attended in accordance with said subpoena and testified, but the said testimony given by this respondent is not set out in said paragraph and the excerpt [fol. 34] therein set out, which purports to be a part of his testimony, standing alone, does not reflect the true situation nor all of the facts stated by this respondent in his testimony, but the same will be set forth in this answer later, and as to what purports to be quoted from the testimony of Albert Elmore this respondent says that the facts in regard thereto will be hereinafter set forth, and except as herein admitted the third paragraph is denied.

4. That this respondent was not present on the 29th day of September 1939 when another hearing was had herein, but this respondent says that the recitals in said fourth paragraph purporting to set forth the testimony of W. H. Elmore at said hearing is not true as related to this respondent and the same is denied, but the facts in regard to the matters referred to in said testimony, are as follows:

That one afternoon W. H. Elmore appeared at the office of this respondent, near Lumberton, North Carolina, and was at said office some time before this respondent had an opportunity to see him; that said W. H. Elmore was there in company with L. C. Mayers and the said W. H. Elmore appeared to this respondent to be normal and not under the influence of liquor or anything else that interfered with his normal appearance and conversation, and that the said Elmore told this respondent that he had moved to South Carolina and was then living with his daughter near Conway, South Carolina, and this respondent already knew that the said W. H. Elmore had for several years lived not far from this respondent's place of business and near the National Cotton Mill settlement.

The said W. H. Elmore stated then to this respondent that he was old and in bad health and that he did not care to be

troubled further with a law suit which had been instituted in [fol. 35] the Federal Court, at Duxham, by him as Administrator of his deceased son, James Elmore, and that he wanted to be rid of it and the administration and desired this respondent to help him. This respondent told him that he did not know what to do about such matters and that at that time of the day he did not think that he could procure for him the services of Mr. W. E. Timberlake, a lawyer, in Lumberton, who usually attended to the matters which this respondent had, but that he would call and find out, and upon calling this respondent found out that Mr. Timberlake was then in Laurinburg, and would not return until next morning. Although the said Elmore was anxious to return to South Carolina that night, he waited until next morning to see Mr. Timberlake. That Elmore did not want to stay at the hotel and it was not convenient for him to stay at the home of Mayers, and this respondent offered to let Mayers and Elmore occupy a room at his home, in Lumberton, which they did.

This respondent says that he was not taking his meals at home at that time and advised them that he would be away from home until late at night and would probably leave in the morning before they got up, but that they could take their meals, if they so desired, at his expense at his brother's place, which is located at the junction of the paved highways immediately east of Lumberton—that he did not see either Mayers or Elmore until next morning when he went to his brother's for breakfast and found them there eating breakfast, and from there Elmore went with this respondent to Mr. Timberlake's office and Mr. Mayers said that he was going to a garage.

That this respondent went with Elmore to the office of Johnson & Floyd, attorneys, with which firm W. E. Timberlake is connected and this respondent went with the said Elmore to Timberlake's office and stated to Timberlake in [fol. 36] the presence of Elmore the request which Elmore had made of this respondent at his place of business on the day before. Mr. Timberlake then talked with Elmore and determined upon the information given him by Elmore that he would set out in the papers which Timberlake drew and Elmore verified before Miss McLean, a Notary Public in the office of Johnson & Floyd. That this respondent did not dictate or attempt to control what should be said in these

papers and that Mr. Timberlake determined for himself upon the statements made by Elmore what he would write into these papers, including the letter to William B. Guthrie, a copy of which was sent to this Court.

When the said paper was drawn the same was given to Elmore and he took the same to C. B. Skipper, then Clerk of the Superior Court of Robeson County, and this respondent went with him. That nothing was said to the said Clerk by this respondent until the said Clerk had finished talking with Elmore and had announced that he would sign the order and told Elmore that he must pay some costs, to-wit, One Dollar, as this respondent now recollects, and Elmore said that he did not have the change and this respondent said that he would pay the one dollar, which payment he did then make to the said Clerk and that he and Elmore left the Clerk's office and when all the matters had been concluded he was later advised by Mayers that he took Elmore home in Horry County, South Carolina, near Conway.

That this respondent gave no liquor, directly or indirectly, to the said Elmore on either of the days referred to, or at any other time, and had no knowledge that anybody else had given him any liquor, whatsoever, and that the said Elmore appeared to be sober at all times on said day and did not smell of liquor or show to this respondent any signs whatever that he was not normal and in his right mind.

[fol. 37] That this respondent made no inducements to the said Elmore to execute the papers referred to in the testimony heretofore taken and paid him nothing, but attempted to assist him as herein set out, and not otherwise.

That this respondent admits that his daughter married a son of one of the defendants herein, but he has never discussed this suit with either of the defendants, or his said son, and nothing done by him has been done at their instance or request, or with their knowledge, so far as this respondent is able to state.

This respondent says that he has prepared no paper herein and he denies the allegations in the motion to that effect, and says that he did not undertake to write any paper, but was thoroughly satisfied that when Mr. Timberlake had talked to Elmore that the said Timberlake would take such action as was right and proper, and that it was right and proper for this respondent to go with the said



Elmore under the circumstances herein set out to the said Timberlake to the end that such papers as Elmore desired might be executed.

This respondent says that L. C. Mayers is a tenant on his farm, but that he did not send the said Mayers after Elmore and did not give him any liquor at any time or pay for any liquor to be used by the said Mayers and Elmore, or either of them, and that he did not procure the said Mayers to go to South Carolina for said Elmore, and that the only thing he said in Mayers' presence with respect to Elmore and this action was several weeks before the said Elmore came to this respondent's office, at which time, as a matter of general conversation with Mayers, this respondent said that Elmore had instituted a suit against the B-C Remedy folks and that since this respondent's daughter had married a son of one of the partners, he would be glad if Elmore would dispose of the suit and not trouble them any more, and Mayers remarked that he knew Elmore and [fol. 38] if he had an opportunity to do so he would speak to him about it, and this respondent did nothing whatever further in the matter and the remark above quoted was considered by him no further until the said Elmore appeared at his office, as above recited. This respondent paid Mayers no expense in connection with his trips to South Carolina whatsoever.

5. That this respondent is a resident of Robeson County, North Carolina, which is a part of the Fayetteville Division, of the Eastern District of North Carolina, and that he did not intend to interfere with the administration of justice in this Court, and did not intend any disrespect to this Court. The papers that were prepared by the said Timberlake were filed in the office of the Clerk of the Superior Court of Robeson County, North Carolina, in the matter of the administration of the estate of James Elmore, deceased, and this respondent is informed and believes that the said Clerk had full jurisdiction over the administration of estates, including the power to discharge administrators, and that when properly satisfied the said Clerk would enter proper orders therein, and the said Clerk did talk to the said Elmore in person and apparently satisfied himself before entering the order of discharge. That the said Clerk is now dead and he is unable to present him as a witness in this cause.



Wherefore, this respondent prays that the rule to show cause be discharged and that he be allowed to go hence without day.

L. R. Varser, Attorney for R. H. Nye.

*Duly sworn to by R. H. Nye. Jurat omitted in printing.*

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[fol. 39] IN UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF NORTH CAROLINA, DURHAM DIVISION

W. H. ELMORE, Administrator of James Elmore, deceased,

vs.

C. T. COUNCIL and GERMAIN BERNARD, co-partners trading  
as BC REMEDY COMPANY

JUDGMENT—Filed March 14, 1940

In this cause, the plaintiff voluntarily comes into court and submits to a judgment of voluntary non suit, and it is accordingly considered/ordered and adjudged that that this action be and the same is hereby dismissed as of judgment of non suit.

The plaintiff will pay the costs of this action to be taxed by the Clerk.

Dated at Wilkesboro, N. C., this March 13, 1940.

Johnson J. Hayes, U. S. Judge.

Assented to:

Wm. B. Guthrie, Attorney for the Plaintiff.

W. H. Elmore, Administrator of James Elmore, deceased.

W. H. Elmore, Personally.

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[fols. 40-55] IN UNITED STATES DISTRICT COURT FOR THE  
MIDDLE DISTRICT OF NORTH CAROLINA, DURHAM DIVISION

[File endorsement omitted]

In the Matter of R. H. NYE and L. C. MAYERS, Contempt

Statement of Evidence—Filed April 10, 1940

• • • • •

[fol. 56] W. E. ELMORE, movant, having been duly sworn, testified:

Direct examination.

By Mr. Guthrie:

Q. Your name is W. H. Elmore?

A. Yes, sir.

Q. Where do you live, Mr. Elmore?

A. I live in South Carolina in Horry County, about 10 or 11 miles from Conway.

Q. And where do you get your mail?

A. I live at O. H. Chestnut's.

Q. What route?

A. Route one.

Q. Do you know L. C. Mayers?

A. Yes, sir.

Q. Has he been to your home in the last three weeks?

A. He come down there, him and Tom McNeill a few days ago and had two other men with him.

Q. That was in the last three or four weeks?

A. They know when they went down there. It was four of them.

Q. Mr. Tom McNeill? Who was with him, Lonnie Mayers?

A. Yes sir.

Q. Who else?

A. I don't know. One of 'em was an officer. He had a gun in the car.

Q. Did he show you the gun?

[fol. 57] A. It was in the car.

Q. Did he have a badge on?

A. Yes, sir.

Q. No one you knew?

A. I didn't know none of them except McNeill and Mr. Mayers.

Q. Did they come to your place?

A. They come in the yard.

Q. What did they say?

A. Mr. McNeill asked me was I drunk when Mr. Mayers was taking me home and I told him I was.

Q. What else did he say to you?

A. He started to say something else and I told him that I didn't want to talk to him.

Q. Did the man with the gun have anything to say?

A. No sir.

By the Court: Did Mayers say anything?

A. Mr. Mayers when he went to leave my home at that time he had a little liquor in his bottle and he went to give it to me.

By the Court: Last week when you said Mr. McNeill was with him?

A. When he brought me home from Lumberton.

Q. What did McNeill say?

A. Mr. McNeill says to Mayers 'did you give him any liquor?' I told him he gave me a little in a bottle.

Q. Now, Mr. Elmore, going back to last April—did you ever live in Lumberton? And did you know Howard Nye?

[fol. 58] A. Yes, sir.

Q. Did you know Mr. Mayers?

A. Yes sir, I know Mr. Mayers.

Q. What do they call him down there?

A. Lonnie.

Q. Did he come to see you sometime about the 18th day of April of this year?

A. About that time. I never kept the dates.

Q. Where were you when he first saw you?

A. I was working in a ditch for Mr. Bradley Anderson. He come close to me and stopped.

Q. Who was with you?

A. Nobody.

Q. State whether or not he was driving an automobile.

A. He was driving a car.

Q. What time was it?

A. I don't know what time. I never noticed.

Q. You were over at Mr. Bradley Anderson's?

A. Yes sir.

Q. What time of day did he come over to Mr. Anderson's?

A. I never noticed.

Q. Was it morning or afternoon?

A. Afternoon 'way late in the day.

Q. Did he get out of the car?

A. Yes, sir.

Q. Where was Mr. Bradley Anderson at that time?

[fol. 59] A. He was over in the field at the farm working over there.

Q. Where were you with reference to Bradley Anderson's house and barns on his place?

A. I was working on the ditch. I was between his house and barn.

Q. Was anybody with you when Mayers came up?

A. No sir.

Q. What did he say?

A. Well, he come up there and asked me something about veneering wood and I told him that I didn't know any that he could buy.

Q. Is there any veneering wood in that country?

A. No sir.

Q. What else did he say?

A. Well, he told me he had a little drink and he would like to give me.

Q. What was his condition, was he drinking or sober?

A. Well, he didn't seem to be drinking hisself when he first come but he drink some when I drink some.

Q. Where did he get the liquor from?

A. I don't know sir.

Q. Was it in his hand?

A. Well he got it outen the car.

Q. Did you take a drink?

A. Yes sir. He insist on me until I taken a drink. I [fol. 60] taken two.

Q. Where were you?

A. I was between Mr. Bradley Anderson's house and his barn digging a ditch.

Q. What did you drink it out of?

A. A bottle.

Q. What size flask was it in?

A. Pint.

Q. How many did he take and did you finish up the pint before you left?

A. Well, after I taken the second drink I was too drunk to notice much whether it was.

Q. Did it taste like normal liquor or not?

A. It didn't taste right to me. In a few minutes he asked me to go to Lumberton with him. He insist on me going and I told him I didn't want to go and he insist—said Mr. Howard Nye wanted to see me.

Q. Did you then get in the car with him?

A. He carried me to Lumberton and made his first stop at the Nye office.



Q. Was Howard Nye in there?

A. Yes sir.

Q. That was the first stop made?

A. Yes sir.

Q. Who was in the office?

A. Mr. Nye and a lady in there and that was all I seen in [fol. 61] the office. He drive up there close to the office and told me that Mr. Nye wanted to see me in the office.

Q. What was your condition at that time?

A. I was drunk.

By the Court: About how far was it from where you were working to Lumberton?

A. About 60 miles.

By the Court: You said you were working at some Anderson's—is that near where you live?

A. About 2 miles.

Q. He put you out and then he went off?

A. He stayed around there somewhere and when I come out he took me to some house and said it was Mr. Nye's house.

Q. What did Howard Nye say to you?

A. I told him that Mr. Mayers told me he wanted to see me and he said yes, that his daughter married some fellow Council and that was the reason he wanted to get the suit stopped.

By the Court: Speak out so we can hear you.

A. It was some fellow Council.

By the Court: Well, what else was said? I am more interested in what he said.

A. It wasn't but a few words said. I don't remember.

By the Court: Did you tell him then you were willing to drop it?

[fol. 62] A. No sir. I don't know what I said right then—I was drunk. Whenever I got through he taken me to this house and he said it was Mr. Nye's.

Q. Who carried you?

A. Mr. Mayers carried me.

Q. To Mr. Nye's house?

A. Yes sir.

Q. What was in the room where you stayed?

A. Well, I don't know—it was a bed and a dresser in there and I even didn't know it was his house until Mr. Mayers told me.

Q. Did you go to bed?

A. Yes. I slept in the same bed with him.

Q. You and Mr. Mayers slept together?

A. Yes sir.

Q. State whether or not you drank any whiskey in the night with Mayers?

A. I drank a little.

Q. What was your condition next morning?

A. I was sick.

Q. Had you vomited?

A. Yes sir.

Q. What was your mental condition—could you think the next morning?

A. Well I can't think very well, I was drunk and sick the next morning.

[fol. 63] Q. Well now where did you go after you got up next morning?

A. They took me to Mr. Nye the next morning and when I first seen the papers he presented them to me and asked me to sign them.

Q. Do you know Mr. Timberlake? Is that him? (Pointing to Mr. Timberlake).

A. I didn't know him. I wouldn't have knowed him when I seen him.

Q. Were you taken to that office?

A. I don't know.

Q. You went uptown?

A. Yes sir.

Q. Who went with you?

A. I can't place where we got up with Mr. Nye.

Q. Well did Mr. Nye come then where you were?

A. Yes sir.

Q. Was there anybody else in the room besides you and Nye and Mayers?

A. Mayers didn't go in.

Q. There was nobody else?

A. There was some more people.

Q. Did you see a typewriter and a lady in there?

A. I don't know.

Q. You mean your condition was such that you didn't remember at that time?

[fol. 64] Q. Is that your signature? (Handing him the letter of the 19th addressed to Mr. Guthrie.)

A. I signed it in the office when I was drunk.

Q. Who gave it to you for your signature?

A. I don't understand.

Q. Who handed it to you?

A. Mr. Nye.

Q. After you signed it did you buy the stamps to put on that letter?

A. Mr. Nye sealed it and taken me and went to the post office and Mr. Nye paid for the postage and Mr. Nye put it in the post office.

Q. Mr. Elmore, have you got any post office box at Lumberton?

A. No sir.

Q. Where do you get your mail?

A. Conway.

Q. Did he hand you another paper for signature that day about a final account?

A. If he did I don't remember it.

Q. You remember Judge Skipper, don't you?

A. Yes sir.

Q. He carried you over to his place?

A. Yes sir.

Q. Did you sign a paper there?

By the Court:

Q. Who presented it to you?

[fol. 65] A. I don't remember whether it was Mr. Skipper.

Q. Was Nye with you in Mr. Skipper's office?

A. Yes sir.

Q. Who paid the Clerk the dollar?

A. I don't know. I didn't pay it.

Q. And after you left Mr. Skipper's office where did you go?

By the Court: Did you sign this letter about the suit being dropped?

A. Yes sir. I did it while I was drunk.

By the Court: Who put it in the mail?

A. Mr. Nye. He put it in there.

Q. After this did you go back home that day?

A. That day Mr. Nye told Mr. Mayers to go to the filling station and fill his tank with gas.

Q. Did Mayers take you back home?

A. Yes sir.

Q. What time was it?

A. I never noticed exactly what time.

Q. State whether or not you had any liquor on the way back.

A. I had it on the way back but I was so durn sick I didn't take any.

Q. As the result of that drunk how long did you stay in bed?

A. I had to stay in bed or near bed for about three weeks.  
[fol. 66] Q. Where did he put you out?

A. Right up in the yard.

Q. Just tell what he did to you?

A. He carried me home and when he started to leave he gave me a little liquor in a bottle.

Q. How much was in there?

A. I couldn't tell you.

Q. Was it some left in a pint bottle?

A. Yes sir.

Q. Were you able to get in the house?

A. No sir they didn't have to help me.

Q. When did you realize what you had done?

A. The next day.

Q. Were you living with your daughter at that time?

A. Yes sir.

Q. When he took you off did you leave any word where you were going?

A. No sir, I went just like I was. I didn't have my coat.

Q. Mr. Elmore, have you got anything out of this case except the liquor?

A. No sir.

Q. Paid you anything at all?

A. No sir.

By the Court: Was anything promised you to get you to sign the papers?

A. No sir.

[fol. 67] Cross-examination.

By Judge Varser:

Q. Mr. Elmore, about how long did you live out at the National Cotton Mill village before you moved to South Carolina this year?



A. —.

Q. When did you move to South Carolina?

A. I have been staying there most of the time for about three years—I wouldn't say exactly.

Q. You had some people up at the National Cotton Mill village?

A. My son Albert.

Q. Do you know where Albert is now?

A. I don't know whether he is still in the same house or not. I don't know, sir, I haven't been over there in quite a while.

Q. You have been living in South Carolina with your daughter, haven't you?

A. Yes sir.

Q. What is her name?

A. Annie Howard.

Q. And you say that is about 10 miles out from Conway?

A. Well, it might be 10 miles where you turn off and then there is a wood road that may be about a mile or something.  
[fol. 68] Q. And you have been a resident of South Carolina for at least three years?

A. Well I don't know—about three.

Q. Did you formerly live in Robeson County before that three years began?

A. Yes sir at Lumberton.

Q. What part of Lumberton?

A. In the mill village.

Q. And you knew Mr. Nye who has a place of business between the Ada McLean Village and Lumberton on the Railroad?

A. Yes sir.

Q. And you knew Mr. Mayers when he was keeping his store out there?

A. Yes sir.

Q. Now I understand that on this day that you left your ditch that you had not had any liquor until Mr. Mayers got there?

A. Yes sir.

Q. And you left there and got to Lumberton before dark?

A. It was turning dark.

Q. And the office was still open and he and the lady were there and there were some other people?

A. Yes sir.

Q. Do you know Mr. William Carwell, the gentleman sitting right there by Mr. Nye?

A. Yes sir.

[fol. 69] Q. Was he there?

A. He wasn't with him.

Q. You knew his father?

A. No sir. I just been in the store and seen them in there.

Q. Do you recall anybody else that you saw out at the Nye place of business that afternoon?

A. I didn't see nobody but Mr. Mayers and Mr. Nye and the lady.

Q. There were other people passing around?

A. I didn't see them.

Q. Did Mr. Nye tell you the gentleman could not come to Lumberton that night?

A. Sir?

Q. Did you hear him call up over the phone somebody and tell you you would have to wait until tomorrow morning?

A.

Q. And you wanted to wait over?

A. No sir, it won't me wanted to wait.

Q. Were you waiting for anybody?

A. I don't know.

Q. Where did you get supper that night?

A. Didn't get any supper.

Q. Did you see Mayers eat any supper?

A. No sir.

Q. Any breakfast?

[fol. 70] A. Yes sir.

Q. Where did you go to get some breakfast?

A. I et a little.

Q. And where was it?

A. I can't remember.

Q. Wasn't it on the east side of Lumberton?

A. I don't know.

Q. Which way did you go to South Carolina?

A. We went out the Vermont road by Vermont.

Q. Well where else? Did you go through Nichols? Lake View?

A. I reckon.

Q. And you turned to your left when you got there towards Loris? And that was the way you go to where you lived wasn't it?

A. Yes sir.

Q. Did you see anybody that afternoon when you left South Carolina?

A. All I saw was people on the road.

Q. Didn't you stop at a filling station and talk with a man who was running the filling station?

A. No, sir.

Q. Did you stop and talk to him coming back the next day?

A. Who was that?

Q. Arch Spivey—did you see Arch Spivey on the afternoon that you first left home?

[fol. 71] A. No sir.

Q. You went by his filling station?

A. We went by there, but we didn't stop.

Q. Do you know him very well?

A. I know him fairly well but not so much.

Q. You know him when you see him?

A. Yes sir.

Q. How long have you known him—have you known him as much as three years?

A. Yes sir.

Q. Now did you go up in an office on the second floor of a building of what we call Main Street in Lumberton—it used to be the old National Bank Building? Now where is that building with reference to the court house?

A. It is upstairs where the old post office used to be. The post office used to be on the second floor and this office was on the second.

Q. You knew the place when they had a bank where the old post office was. And wasn't the bank there 20 years?

A. Maybe so, I don't know.

Q. How close is that building to Mr. Ertel Carlyle's office?

A. Well it's—

Q. Carlyle's office is between that building and the river bridge isn't it?

A. Yes sir.

[fol. 72] Q. You had been up there several times hadn't you?

A. I had been up there, yes sir. I had not been up there in a long time.

Q. But you talked with Mr. Carlyle about your suit with the BC Remedy Company.

By the Court: Answer whether you talked to him or not.

A. I talked to him before.

Objection by Mr. Guthrie.

Mr. Guthrie: What has that got to do with the contempt?

By the Court: But he is asking him about something that concerns his last interview with Mr. Carlyle.

Mr. Guthrie: I can show from my office if they want to go into it, the connection with Carlyle in this suit. I am going to ask Your Honor to let me go into it further.

By the Court: We will cross that bridge when we get to it. Go ahead.

Objection by Mr. Guthrie overruled.

Q. When was the last time you talked with Mr. Ertel Carlyle? Before you went to Lumberton about the 18th of April this year?

A. I hadn't talked to Mr. Carlyle in a long time.

Q. How long?

A. I don't know—a long time.

Q. Had you talked with him since you took a non-suit in [fol. 73] the State Court suit?

A. No sir.

Q. Now when was that action on your part taken?

A. I don't understand.

Q. When did you dismiss your suit in the State Court?

A. I don't remember the date now.

Q. Well, can you approximate it? Was it February or January, 1939—December, 1938?

A. I forgot.

By the Court: Well, do you remember how long it was before you started the case in the Federal Court? How long was it after you dismissed that case in the State Court?

A. The next day, I think.

(Call for order.)

Q. Had you talked with Mr. Carlyle when you dismissed the suit in the State Court?

A. No sir.

Q. Did you sign a paper in his presence dismissing that suit?

A. I didn't dismiss it.



Q. Didn't you sign a paper agreeing to dismiss it?

A. Mr. Carlyle wanted to drop out.

Q. Well the suit was dismissed?

A. I don't know.

Q. It was dropped wasn't it?

A. Yes sir.

[fol. 74] Q. Did you sign a judgment dismissing it?

By the Court: Did you sign the papers to drop that same case.

A. I don't remember if I did or not.

Objection by Mr. Guthrie overruled.

By the Court: Let him test his memory.

Q. You don't remember signing any judgment yourself, or Mr. Carlyle signing it in your presence, dismissing that suit down there in the Superior Court of Robeson County.

A. I don't remember.

Q. Did you dismiss any suit against the BC Remedy Company in the Superior Court of Robeson County?

A. I just taken up the paper and made a non-suit down there.

Q. Now when did you make it a non-suit?

A. (No answer)

Q. Was it before or after you brought the suit in this court?

A. About the same time I think.

Q. When you did that you were in Lumberton weren't you—living in Lumberton?

A. I didn't say living in Lumberton.

Q. And you were in Mr. Carlyle's office that day weren't you?

A. I was in his office whenever he decided to drop out.

Q. Did you go to his office any more after he decided to [fol. 75] drop out?

A. No sir.

Q. Did you sign any papers after that?

A. I signed a letter for him to quit it.

Q. And he signed the same paper in your presence, didn't he?

A. Yes sir.

Q. And at the same time didn't he tell you the reason he wanted to quit was that he didn't think you could recover anything? Did you tell Mr. Nye that?

A. No sir.

Q. Did you tell Mr. Timberlake that?

A. No sir.

Q. Do you remember seeing a young lady in this office using a typewriter?

A. I don't remember.

Q. Did you sign any paper before any lady?

A. I don't remember—I was drunk.

Q. You wouldn't say you didn't?

A. I was drunk.

Q. But you knew where you were didn't you?

A. I just about—I couldn't remember much about it. I don't remember whose office. In fact, I didn't go in no office anyway—I was just out there in a hallway.

Q. And that is where everybody sits until they are ready to go in the office. Did you take the paper that was given [fol. 76] you to Mr. Skipper's office and carry it to Mr. Skipper, the Clerk?

A. I don't remember whether I carried it or not.

Q. Did you talk with Mr. Skipper after you went over there?

A. I don't know.

Q. Well, didn't Mr. Skipper call you Henry that day and say, 'Hi, Henry, I haven't seen you in a long time,' and didn't you tell him you were living in South Carolina?

Objection by Mr. Guthrie overruled.

A. I don't know.

Q. Did you see a lady working at the desk standing up and Mr. Skipper was standing when you went in and gave him the paper?

A. I don't remember.

Q. You remember that there were two lady clerks in there, weren't there?

A. I don't know.

Q. Did you see any on that day in there?

A. (No answer.)

By the Court: Did you see any women in the office of the Clerk on the day you went in there and this paper was filed dismissing you as administrator?

A. I don't remember.

Q. Do you remember anybody else being in there besides you and Mr. Skipper?

A. Well, I don't know whether it was or not.

[fol. 77] Q. What time of day was it you went over there with this paper?

A. I don't know what time.

Q. Did you tell Mr. Skipper that Mr. Carlyle had told you he didn't think you could recover? Would you say you didn't tell him that?

A. I wouldn't say I didn't, but I don't remember.

Q. Mr. Elmore, you remember when the paper was signed by Mr. Skipper?

A. Yes sir.

Q. Now, when did you leave, before or after you signed it?

A. I don't remember.

Q. Well, would you say you left before he signed it?

A. I wouldn't say I left before he signed it or after—I don't remember.

Q. Did he give you a receipt for the dollar?

A. No sir.

Q. Are you certain of that?

A. I never did have no receipt.

Q. You never did have a receipt from him when you qualified first and when you were discharged?

A. I don't know.

Q. Now, did you say you came to Lumberton from South Carolina on the evening before you went to the Clerk's office with these papers?

A. Yes sir.

[fol. 78] Q. What road did you travel?

A. I come through by Loris and Nichols and around through Vermont.

Q. Did you come through Green Sea?

A. I never seen it.

Q. You have been where they say it is, haven't you?

A. I have been there.

Q. Well, it is nothing but a few cross roads and a few buildings in the road, isn't it?

A. Ain't nothing there much.

Q. Well, did you go by there when you went down?

A. Yes sir.

Q. You remember passing through Nichols both times didn't you?

A. I don't know.

Q. You went through Loris both times, didn't you?

A. I don't remember.

Q. How far is it from Nichols to Loris? 10 miles?

A. I don't know.

Q. Well, where did you find out it was 62 miles from your house to Lumberton? Did you look it up to find out how far it was?

A. That's been a long time.

Q. And you can't tell how far it is from your house to Loris, or from Loris to Nichols?

A. No sir.

[fol. 79] Q. Nor from Lake View to Vermont?

A. As good as I can get at it it is about 62 miles from Lumberton to where I live.

Q. How far is it from Vermont to Lake View? That isn't over 11 miles, is it?

A. I don't know.

Q. You didn't get any supper that night that you went to Lumberton?

A. No sir.

Q. Did you get any breakfast?

A. I et a little bit of breakfast.

Q. You got home about night?

A. Yes sir.

Q. Did you eat the day after that?

A. Sometimes I did and sometimes I didn't—I was sick.

Q. Send for the doctor?

A. No sir, I didn't send for no doctor.

Q. They had a doctor living nearby on the road to Conway, didn't they? About how far?

A. I don't know.

#### Cross-examination.

Mr. McNeill.

Q. Mr. Elmore, you lived at the National Cotton Mill village?

A. Yes sir.

Q. And you knew Mr. Mayers out there?

A. Well—

[fol. 80] Q. Don't you know he ran the store out there?

A. Yes sir.

Q. And that you were his customer? You traded with him practically all the time you were there and you knew him well?



A. I thought I knew him.

Q. When did you say you moved to South Carolina?

A. I didn't say.

Q. Well, was Mr. Mayers living at the Cotton Mill when you moved?

A. I don't think he was.

Q. He had gone away from there?

A. Yes sir.

Q. After you had quit this suit in the State Court did you come up to Lumberton along about February or March?

A. I come up there very often.

Q. And you saw Mr. Mayers on the street there one afternoon, didn't you, and talked with him?

A. Yes.

Q. Did you talk to him about some timber that he wanted to buy and that you told him to come down to your home and you would look around and see if you could find any?

A. I didn't talk to him about no timber.

Q. What did you talk about?

A. (No answer.)

Q. You know where E. H. Carwell's store is?

A. Yes sir.

[fol. 81] Q. Well, I asked you didn't you talk to him about some gum timber?

A. I didn't—not there. He brought it up when he come to me.

By the Court: He brought up the gum timber when?

A. When I was working in South Carolina he talked some about some gum timber.

Q. Well, did you see him at any time between February and March?

A. I don't remember.

Q. Well, you say when he went down to see you he found you in a ditch?

A. Yes sir.

Q. And he spoke to you and you knew him, didn't you?

A. Yes sir.

Q. And you talked to him casually?

A. A few words.

Q. And he asked you about the gum timber, and how long did you talk to him?

A. Just a few words.

Q. And where were you then, were you in the ditch?

A. I had just got out of the ditch.

Q. And then he told you he had a drink for you?

A. Yes sir.

Q. Well, how many drinks?

A. Well, it was some gone out.

By the Court: Was the bottle full when you started to [fol. 82] drink out of it, or was some gone?

A. I don't know. I hadn't drank no whiskey in a long time.

Q. And you were plum sober?

A. I don't know when I had any whiskey—it had been a long time.

Q. And you mean he pulled out a bottle of whiskey and offered it to you and you can't remember whether it was any gone or not?

A. I didn't pay any attention to whether any was gone or not.

Q. And then you say you took a drink—and that made you drunk?

A. In a little while I got drunk.

Q. How do you know he asked you to go? You said you were drunk, didn't you?

A. A drunk man can hear.

Q. Well, did you understand that?

A. Understand what?

Q. That he wanted you to go?

A. He said he wanted me to go.

Q. Did you understand who he wanted you to see after you got to Lumberton?

A. (No answer.)

Q. Answer my question, Mr. Elmore. Did you understand the name of the man he wanted you to see when you went to Lumberton?

[fol. 83] A. He said Mr. Nye wanted to see me.

Q. You understood, didn't you, that he was going to see Mr. Nye?

A. (No answer.)

Q. Well, you remember that don't you?

A. Yes sir.

Q. Didn't talk about the case at all?

A. He said Mr. Nye wanted to see me.

Q. Well, I ask you, Mr. Elmore, if you didn't tell Mr. Nye that you were glad to see him and you told him that

you were worried terribly about a law suit that you had up here in Durham and that you were sick and physically unable to attend to it?

A. No sir, I did not.

Q. And didn't you tell him that Mr. Carlyle, your lawyer from Lumberton, had discouraged you so about it that you didn't think there was anything to it?

A. No sir.

Q. Didn't tell him a word about Mr. Carlyle?

A. No sir.

Q. And Mr. Nye wanted see you?

A. Yes sir.

Q. Well, what did he say he wanted to see you for?

A. About the suit.

Q. You knew Mr. Nye, didn't you?

A. Yes sir.

[fol. 84] Q. You got in Mr. Mayers car and rode on just to see Mr. Nye without knowing what you were going to see him about?

A. I did it after I was drunk.

Q. Well, I ask you didn't you want to go so bad that you told him you would not go back home, but that you would go just as you were so that you could get back before late that night?

A. No sir.

Q. You didn't do that?

A. No sir.

Q. Well, did he promise to take you back that night?

A. He told me that if I would go he would bring me back home. He said he would bring me back.

Q. Don't you remember he told you that Mr. Nye was related by marriage to some of the BC folks—that his daughter had married Mr. Council's son?

A. Mr. Mayers didn't tell me—Mr. Nye told me that.

Q. Do you recall when you got to Lumberton stopping at a restaurant on the edge of town and getting supper?

A. I don't remember.

Q. Don't you remember getting out of the car and eating supper?

A. I don't remember eating anything that night.

Q. Not a thing?

A. No sir, I don't remember.

[fol. 85] Q. Well then, you remember getting to Mr. Nye's place of business?

A. Mr. Mayers carried me there.

Q. You remember it, don't you?

A. Yes, I do.

Q. You remember seeing Mr. Nye when you got there?

A. Yes sir.

Q. Do you remember seeing another gentlemen who was in there with him?

A. (No answer.)

Q. Well, did you go in the office?

A. I went in his office.

Q. And what did he talk to you about when you got there?

A. I told him that Mr. Mayers said he wanted to see me. He told me yes that his daughter married a man by the name of Council and that was the reason he wanted to get the BC suit stopped.

Q. You didn't know anything about his interest?

A. Sure I did.

Q. Well, how did you know what he was going to talk about?

A. I didn't know.

Q. So he just up and told you that his interest in the BC suit was on account of his daughter's marriage?

A. That is the way I learned it.

Q. Well, what did he ask you to do then?

A. I don't remember.

[fol. 86] Q. Well, you found out anyway that you weren't going to do it that night, didn't you?

A. Yes sir.

Q. Now, you have got a son living near their place, Mr. Elmore. Why didn't you go there that night?

A. Well, it looked to me like they wanted to keep me with them.

Q. How close does he live?

A. Well, I 'spect it is two miles.

Q. Didn't Mr. Mayers ask you if you wanted to stay with him?

A. He didn't ask me—

By the Court: What was it you started to say there? He asked you if Mr. Mayers didn't ask you to spend the night with him?

A. They didn't ask me to stay with him. Mr. Mayers took me on the car and carried me to that house where we stayed together that night.



Q. Did Mr. Nye ask Mr. Mayers to take you home with him?

A. No sir.

Q. Don't you know that he did and he told you that he didn't have room?

A. He didn't ask Mr. Mayers anything about it.

Q. And didn't you tell him that if Mr. Mayers would stay with you at his home you would stay?

A. No, and I didn't say it.

[fol. 87] Q. Well, do you remember getting to Mr. Nye's house?

A. Mr. Mayers carried me.

Q. Do you remember going to bed?

A. Yes sir.

Q. Who did you sleep with?

A. Mr. Mayers that night.

Q. How many beds were there?

A. One.

Q. Did you sleep all night?

A. I slept sometimes and sometimes I was awake.

Q. Did you drink all night?

A. No sir.

Q. Didn't take any at all after you got to Mr. Nye's house?

A. Just a little.

Q. Do you remember waking up next morning?

A. I do.

Q. And you remember getting up and going with Mr. Mayers to a restaurant, don't you?

A. Yes sir, I remember getting up mighty sick that morning and—

Q. And you ate, didn't you?

A. I et a little.

Q. Now Mr. Nye came in, didn't he, while you were eating?

A. Yes sir.

Q. Did you part company with Mr. Mayers?

[fol. 88] A. I left him somewhere—I don't know where.

Q. And don't you know Mr. Mayers made an engagement to meet you at McCloud's Garage when you got through your business?

A. I reckon I met him—I don't know whose garage it was.

Q. Did you see him in Mr. Timberlake's office?

A. Who—Mr. Mayers?

Q. Yes.

A. I never seen him at the court house.

Q. Then the next place you saw him was the garage?

A. I don't remember.

By the Court: Where did you leave from?

A. I left from what they call Lumbee filling station—Mr. Mayers filled his tank with gas.

Q. You met him at the Lumbee? Don't you know that you bought some groceries there and carried them on home?

A. If I did, I don't remember.

Q. You know Mr. John French don't you? Do you remember getting the gas?

A. (No answer.)

Q. Well, did he get it?

A. I reckon he got it.

Q. Well now, don't you know you left there and went right straight to Mr. John French's and stopped and got your groceries to carry home?

By the Court: Did you or not?

[fol. 89] A. I bought a little.

Q. While you were drunk?

A. Yes sir.

Q. Who did you buy them from?

A. I don't know. I bought a little bit of meat.

Q. What for?

A. I got it to eat.

Q. I thought you were drunk?

A. I was drunk.

Q. Mr. Elmore, you say that you recall when I went to see you down at Conway, near Conway at your home, you remember that, don't you? And you were sober that day?

A. Well, I didn't stay drunk all the time.

Q. And your daughter was there, wasn't she?

A. Yes sir.

Q. And she was the person who met me at the door?

A. I reckon so.

Q. Don't you remember that I called for Henry Elmore, and that she said Henry Elmore was in the house. You remember that, don't you?

A. I don't know—I reckon she told you.

Q. Didn't you come to the door?

A. Yes, I went to the door.

Q. And then I talked with you a few minutes about your father, thinking you were young Henry, and then your daughter spoke up and said, 'Why, this is W. H. himself,' [fol. 90] and then I said, 'I don't want to talk to you, Mr. Elmore.'

A. I didn't talk to you. I didn't want to see you.

Q. And then you told me in respect to a question about the drinking that when you got home you were perfectly sober. Now didn't you say that?

A. No sir.

Q. You remember that you said that Mr. Mayers gave you when you got home one-quarter of one-half pint of liquor?

A. Well he gave me some liquor.

Q. Well I ask you, didn't you say that?

A. I said that he gave me some liquor.

Q. And didn't you say that was all the liquor you could tell me anything about?

A. No sir.

Q. I asked you if that was all he gave you, and didn't you tell me in the presence of your daughter that you were absolutely sober?

A. Didn't she tell you I was drunk?

Q. No.

A. She sure did. He says to my daughter, 'Was he drunk when Mr. Mayers brought him home?' and she said, 'Yes,' and you said, 'He was?'

Q. Mr. Elmore, don't you recall that you said when you got home that you were plum sober?

A. I didn't say it.

Q. Now the gentlemen who went down with me was the [fol. 91] rural policeman of your precinct down there, wasn't he?

A. I don't know.

Q. Mr. E. R. Connor, owner of the place drove the automobile?

A. I didn't know him. So many people in Conway I don't know.

Q. Now let's see Mr. Elmore, you say you know Mr. — and he knows you?

A. Yes, I reckon he knows me all right.

Q. You know Mr. Tillman Hardy?

A. I know him but I never seen him.

Q. Why, don't you know you came back by there with Mr. Mayers going home, and that you talked to him and that you got your Pepsi-Cola drinks there?

A. I got some drinks but I never talked to any of them there.

Q. Why, Mr. Elmore, don't you remember the conversation about the \$50.00 bond?

A. No sir.

Q. Didn't you hear that?

A. No sir.

Q. I ask you, didn't you join in that conversation about that matter?

A. No sir.

Q. You know Stanley Spivey, don't you?

A. Yes sir.

[fol. 92] Q. What did Mr. Mayers say about Stanley?

A. He said he knowed him.

Q. Why, don't you recall the talk about the \$50.00 bond?

A. I don't remember that.

Q. You remember that, don't you?

A. No sir.

Q. Don't you remember him telling Mr. Mayers here that his son bought the place?

A. No sir.

By the Court: About how much longer will it take you to complete this examination?

(Recess for lunch.)

Mr. McNeill resumes his cross-examination of Mr. Elmore.

Q. Mr. Elmore, after you got home when did you say that you remembered that you signed these papers?

A. Right after I got sober.

Q. Well, how did you find it out?

A. I thought of it then.

Q. How could you know what you had done?

A. Well, I knowed I signed it but I was drunk.

Q. Did you know what you had signed?

A. After I got sober I thought about it.

Q. After you got sober what occurred to you that you had signed?

A. Well, I thought about what I had done.



[fol. 93] Q. Did it come back to you?

A. Yes sir.

Q. You remembered then about Mr. Skipper? About the Clerk of the Court's office? You remembered that, didn't you?

A. I was drunk.

Q. You say though, after you got sober now, you say that you remembered what you had done. What first came to your mind as to what you had done?

A. Well, I don't know what first came to my mind.

Q. Did it come to your mind that you had quit being Administrator?

A. I knowed I had signed a paper and I was drunk, and I don't know what it was on.

Q. What did you do when it came to your mind?

A. Nothing.

Q. Well, when did you do something?

A. Sir?

Q. When did you take any steps about what you had done in Lumberton to undo them?

A. (No answer.)

By the Court: Did you do anything until you were subpoenaed by this Court and came here to Durham to testify?

A. No sir.

By the Court: Well then, after that was done you signed [fol. 94] an affidavit or petition prepared by Mr. Guthrie and had that order stricken out. Is that right?

A. Yes sir.

By the Court: Didn't Mr. Guthrie prepare a paper for you when you were here the other time?

A. Yes sir.

Q. What did you do with this paper?

A. I don't understand what you mean.

Q. Well, how did you know what to tell Mr. Guthrie ought to be put in the paper that he fixed for you?

A. Mr. Guthrie—

Q. Who told Mr. Guthrie what to put in that paper?

A. (No answer.)

By the Court: What was your answer—now he asked you how Mr. Guthrie knew what to put in that paper?

A. I don't remember now.

Q. Now the truth is, Mr. Elmore, you can't remember any more about that paper than you can about the one that you signed for Mr. Timberlake and Mr. Skipper.

A. I know Mr. Guthrie signed a paper down there—I think for a non-suit. I don't understand what paper.

Q. Did you sign a paper for Mr. Guthrie to put yourself back as Administrator?

A. Yes sir.

Q. Who told Mr. Guthrie — to put in that paper?

A. I don't know—I didn't tell him what to put in that [fol. 95] paper.

Q. Didn't you tell him?

A. No sir.

Q. Well, how did he know what to put in it then if you didn't know what to tell him? Now the truth of it is, you put in that paper whatever Mr. Guthrie wrote down there, didn't you?

A. (No answer.)

By the Court: Answer the question. Did you understand it?

A. No sir.

By the Court: He wants to know if you told Mr. Guthrie what to put on that paper when he went back to the Clerk's office and got you put back as Administrator?

A. Well, Mr. Guthrie fixed it.

By the Court: Well, these people weren't all present and they might not know how all these things happened. Did you appear in this Court in Durham, and did you go on the stand as a witness and Mr. Guthrie present them, and did you testify under an oath after being sworn there in open Court about how this thing happened in Lumberton?

A. Yes sir.

By the Court: And was it after that or before when Mr. Guthrie signed some papers to put you back as Administrator. Did you testify as a witness or sign the papers first?

A. I testified first.

By the Court: And after you had been a witness here, [fol. 96] you and Mr. Guthrie fixed up the papers?

A. Yes sir, I think we did.

By the Court: Did he go back with you to Lumberton?

A. No sir.

By the Court: Who went with you back to Lumberton from here, do you remember?

A. It was my son, Henry, and a fellow named Causey brought me up here and took me back.

Mr. Guthrie: The paper was mailed by me to Lumberton. I mailed it to an attorney there and he gave it to the Clerk.

Q. Now who did you talk to before you went on the stand here and testified?

A. Nobody.

By the Court: Had you talked to Mr. Guthrie before you went on the stand here the other time?

A. No sir.

Q. Well who did you talk to?

A. Nobody.

Q. Why did you come here?

A. Well, I got a subpoena or something like that to come here.

Q. Well when you came here who was the first man you saw?

A. I don't know.

By the Court: You were first notified by this Court, weren't you to come to Greensboro and you didn't come—you [fol. 97] didn't go when the Court notified you to appear?

A. No sir. I didn't have no way 'cept to walk.

By the Court: Well then, later you had a subpoena to come to Durham. Who brought you?

A. This fellow Causey brought me.

By the Court: Who furnished the money?

A. I don't know who it was.

Q. Do you know what was in the paper you signed for Mr. Guthrie? Can you read?

A. A little bit.

Q. Did you read that paper?

A. Which paper?

Q. The one you signed for Mr. Guthrie?

(Judge Hayes looks for the paper in his files.)

Q. Mr. Elmore, where did you spend the night when you were in Durham?

A. At a hotel.

Q. What hotel?

A. This one around here. I don't know what was the name.

Q. Who was with you?

A. Henry.

Q. Who else?

A. A fellow by the name of Will Causey.

Q. Where does he live?

A. He lives in South Carolina.

Q. Is he here?

[fol. 98] A. No sir.

Q. You mean to say you didn't talk to anyone about this case before you went on the stand?

A. Not that I know of.

Q. Well, you would know it if you did, wouldn't you?

A. Well, sure, and I didn't talk about the suit to nobody.

By the Court: Did you even speak to Mr. Guthrie before you went on the stand?

A. I didn't even see him.

Q. Well, did you get any letters from Mr. Guthrie or anybody else about this non-suit of yours in Robeson County?

A. Not that I know of.

Q. Has anybody from up here been to see you?

A. No sir.

Q. Hasn't Mr. Guthrie been there?

A. Yes.

Q. How many times did he go to see you?

A. I don't remember.

Q. Well, I ask you, isn't it a fact that the first time you thought about bringing this thing back was when Mr. Guthrie came? Did Mr. Guthrie go to see you in South Carolina?

A. Not that I know of.

Q. Well, did anybody from Durham go to see you in South Carolina?

A. Not that I know.



[fol. 99]. Q. Well I ask you, if a man from this town didn't go to see you down there just after I was there?

A. (No answer.)

Q. And the very officer that went with me down didn't show him the way to your house?

A. I don't know.

By the Court: You said you could read a little. How far along did you get in school?

A. About three months.

By the Court: How old are you?

A. 65.

By the Court: Have you ever done anything except worked as a hand?

A. No sir.

By the Court: Ever have any experience in law business other than this?

A. No sir. Never had a suit before, never been arrested or locked up in my life. I try to tend to my own business.

By the Court: You worked at the cotton mill all the time except when you were on the farm?

A. Yes sir.

By the Court: Have you anything else to ask him, Mr. McNeill?

Mr. McNeill: No sir.

[fol. 100] Recross-examination.

Judge Varser:

Q. Did anybody go down to see you this year after you say you had been up to Lumberton and seen Nye with your son Albert? Did Albert go down with anybody else on Sunday?

A. I don't believe he did that I know of.

Q. You didn't remember that Albert went down there with somebody from Durham on Sunday shortly before you got subpoenaed to go to Greensboro?

A. No sir.

Q. You didn't attend at Greensboro?

A. No sir.

Q. But you did come to Durham?

A. I didn't have no way to get to Greensboro.

Q. Wasn't the same man there to bring you?

A. He was there but he couldn't bring me.

Q. Did you pay him anything?

A. I paid him a little.

Q. Where did you get the money? Didn't you testify here in Durham that the Marshal gave you \$30.00?

A. No sir.

Q. You didn't testify that?

A. That Marshal—I never seen that Marshal.

By the Court: The U. S. Marshal in South Carolina sent a telegram to the Clerk of this Court here that he had to [fol. 101] have \$30.00 to pay these witnesses—fees for these witnesses to attend this Court, and he sent the message collect. The Clerk of the Court had no funds from which he could pay the message and he sent it to the Court, and I instructed him to return the telegram.

Mr. McNeill: I went to South Carolina after that and I found out from the Sheriff how this man had the \$30.00 and came up here. It was perfectly legitimate, the way he got the \$30.00.

A. I never seen the Marshal.

Mr. McNeill: The Sheriff of Horry County loaned or advanced this man \$30.00 to come up here with.

Mr. Guthrie: And I have a letter from the Marshal asking for the \$30.00 he advanced.

By the Court: I have a letter dated the 2nd of October. (Reading from letter) 'I have your letter of September 27th in which you advance W. H. Elmore, Henry Elmore, and Annie Howard \$30.00 which is to be paid to Sheriff W. E. Sessions of Horry County, S. C. .... case apparently has been settled by the plaintiff and the defendant .....' After the telegram was refused a letter came and here is what the letter says. It is addressed to Henry Reynolds. (Reads letter) '..... I have called Sheriff W. E. Sessions of Horry County and asked him to advance ..... please advise this office as soon as possible in the above matter as I assured [fol. 102] him that this office would be responsible for the advance .....

Mr. Guthrie: Prior to the hearing on the 29th of September I got the address of the U. S. Marshal at Charleston, S. C., and wrote him and sent him the subpoenas and told him it was a pauper suit. The next thing I knew about it was when Your Honor called the witnesses I looked up and

there was Mr. Elmore, and I remarked to Your Honor, 'Why here is the plaintiff!' and you asked me if I would like to talk to him, and I said, 'No sir, I would like to question him. I never spoke to him—never gave him a dime to get up here.

By the Court: Well, I was surprised that the Marshal advanced any such money. I say for information of you counsel who were not present at the hearing of the 29th, Mr. Guthrie began the cross-examination and I stopped Mr. Guthrie and asked the witness myself to state in his own way just what occurred at the time that he signed these papers, but Mr. Guthrie was examining him as a hostile witness when he started I think.

Redirect examination.

Mr. Guthrie:

Q. Mr. Elmore, Mr. Carlyle was your original counsel in the suit that you first instituted in the Superior Court. How long did that case lay there?

A. About two years.

Q. At that time had you tried to get Mr. Carlyle to proceed with your suit?

A. I went to see him several times.

[fol. 103] Q. Did Mr. Carlyle sign your non-suit down there?

A. No sir.

Q. I was the man who signed it?

A. Yes sir.

Q. I understand you asked Mr. Carlyle to proceed or get out?

A. Yes sir.

Q. When I saw you down there and asked him to meet me, didn't I inquire of you why it was that you didn't proceed with your suit?

A. Yes sir.

Q. And didn't you tell me that Mr. Carlyle would not proceed or get out?

A. Yes sir.

Q. And I told you that you had a right to sue in the Federal Court if you were a resident of South Carolina?

A. Yes sir.

Q. And you asked me to proceed with it, that everybody had abandoned you but me?



A. Yes sir.

Q. Where were you living when you qualified as administrator?

A. Lumberton.

Q. You moved when?

A. I moved about a week after that.

[fol. 104] Recross-examination.

Judge Varser:

Q. You took out letters of administration on the 7th day of August, 1937, on your son James' estate?

A. I reckon it was—I haven't got the date.

Q. Well, the two years were just out this past August?

A. It might have been longer.

Q. Well, how did it get to be two years when you took a non-suit last spring?

A. I don't know.

Q. That shows right here to be the 7th day of August, 1937. How did you get two years out of it from the time you took the non-suit? As a matter of fact, your suit in Robeson Superior Court was heard within sixty days after it started, wasn't it?

A. (No answer.)

Q. Well, don't you know it was a right fresh suit when you took a non-suit, and that you didn't even wait for the defendants to file an answer?

A. I don't understand.

By the Court: He wants to know if you didn't stop the case right after you started it in the State Court, and before the defendants filed an answer?

A. Well, not right quick.

Q. Well, you stopped it within two months after it started didn't you?

A. I don't think I did.

[fol. 105] Q. You think it was two years?

A. Well, Mr. Carlyle wouldn't—

Q. I asked you about the time.

A. Well, I didn't keep up with it.

Q. Well, you said just now it ran about two years. Did you mean that?

A. I thought it was about that time.

By the Court: Do you remember when your son died?



A. Yes sir.

By the Court: When was that?

A. About October 30th.

Q. What year?

A. About '37 I think.

By the Court: How long has he been dead?

A. He's been dead about three years I reckon.

By the Court: Didn't you say this morning that you were not paid anything to stop the case? Mr. Nye didn't give you any money?

A. No sir.

By the Court: And Mr. Mayers didn't pay you anything?

A. No sir.

By the Court: And nobody else paid you anything and nobody promised you anything?

A. No sir.

#### Redirect examination.

Mr. Guthrie:

Q. I ask you if it isn't a matter of fact that they filed [fol. 106] a motion to strike certain allegations from the complaint and it laid there dead, and Mr. Carlyle never attended to it?

A. Yes sir. I asked Mr. Carlyle if he wanted to quit it and he wasn't doing anything for me and I decided to let him quit it.

Mr. Guthrie: Your Honor, there has been some question raised concerning the date of the dead man's death certificate. He died on the 4th of November, 1936.

Judge Varser: That is immaterial.

Mr. McNeill: I would like to explain to Your Honor in reference to my trip to see him in South Carolina, at that time there was only a citation served on my client.

By the Court: Well, that is all right. I will hear you sometime later.

[fol. 107] HENRY ELMORE, witness for the movant, having been duly sworn, testified:

#### Direct examination.

Mr. Guthrie:

Q. Your name is Henry Elmore?

A. Yes sir.

Q. Where do you live, Henry?

A. Conway.

Q. Are you the son of W. H. Elmore?

A. Yes sir.

Q. Do you know L. C. Mayers?

A. Yes sir.

Q. Did you see him near Conway on or about the 19th day of April this year?

A. That was when he carried him off.

Q. Did you see him when he returned?

A. Yes sir. He was standing on Mr. W. H. Causey's place.

Q. Who was with your father?

A. Mr. Mayers.

Q. Were you there when he got out of the car?

A. Yes sir.

Q. What was the condition of your father?

A. Well, he staggered a few times—he was drunk enough.

Q. Was he under the influence of liquor?

A. Yes sir.

Q. After Mr. Mayers drove up and he got out what did Mr. Mayers do?

A. He left.

[fol. 108] Q. Did he leave any liquor?

A. I didn't see any but daddy said he did.

Q. Did he hold any conversation with you? Is this Mr. L. C. Mayers here?

A. Yes sir.

Q. Did you know him prior to that time?

A. Yes sir.

Q. Which way did he go?

A. Same way he come in.

Q. What was the condition of your father?

A. He was sick and drunk together, and so near sick he had to go to bed.

Q. What was his mental condition?

A. He didn't have no mind at all.

Q. Did he go to bed?

A. Yes sir.

Q. Did you have to help him get to bed?

A. He finally got to bed himself.

Q. When did you first discover he had been to Lumberton?

A. Mr. Howard was telling you about it.

Q. When did you find out?

A. It was about two days.

Q. Who did you find it out from?

A. He told me.

Q. What did he tell you?

[fol. 109] A. He told me that Mr. Nye had persuaded him to drop the suit on account of the marriage of Mr. C. T. Council's relations; that he kept on after him until he got him to drop it. He said he slept in the home of Mr. Nye. He said Mr. Mayers supplied him with liquor all along the road and all during the ride and he was so sick he couldn't drink any more.

Q. Is your father a drinking man?

A. No sir.

Q. Did he keep whiskey?

A. No sir.

Q. What his condition for two or three weeks?

A. He was sick. Two-thirds of the time he laid in bed. He didn't even eat—just a mouthful at the time.

Q. Henry, were you present sometime right after the 19th, I believe it was the 23rd of April that I came to your father's home with a lady who was a stenographer and talked with your father. This lady was in the car?

A. Yes sir.

Q. Albert came down with me and asked your father why he had acted like he did. Were you there?

A. Yes sir.

Q. State whether or not your father asked me to go aside with him that he wanted to talk to me?

By the Court: I don't see any use in going into that.

[fol. 110] Q. Mr. McNeill and Mr. Mayers came down on Monday and then I took some affidavits and wrote them there in your house and had a typewriter with me. I left there Saturday night, and the following morning Mr. Mayers and this patrolman turned up at your house.

By the Court: Were you in there?

A. No sir. They tried to locate me but they didn't.

Q. Are you the brother of Miss Annie?

A. Yes sir.

Q. Has Miss Annie any small children? Could she come here if she had to?

A. She couldn't come very easy, but if she had to come she might get here.

Q. Who gave you the money to get here the first time?

By the Court: We have already gone into that.

Q. I went down and got you yesterday?

A. Yes sir, we went to Fayetteville and met you there.

Q. And I paid your bus fare, and I am paying your hotel bill now?

A. Yes sir. And I ain't went liking for a thing yet!

Cross-examination.

Judge Varser:

Q. Do you live in the Howard home?

A. No sir, about two miles.

Q. Well, this time you spoke of seeing your father come back was the time he was supposed to have come back from Lumberton?

[fol. 111] A. Yes sir.

Q. Do you now recollect when that was?

A. Not the date of it.

Q. How many brothers and sisters have you living now?

A. Three brothers and one sister.

Q. That is Mrs. Howard and yourself and three boys and one girl?

A. Yes sir, there were five boys and one girl.

Cross-examination.

Mr. McNeill:

Q. Do you live in the home with your father?

A. No sir.

Q. How far do you live from there?

A. About two miles.

Q. Where were you living when Mr. Mayers went there?



A. I was staying on the same farm in a different house.

Q. You didn't see him when he went down?

A. No sir.

Q. You did see him when he went back?

A. Yes sir.

Q. Did I understand you to say that it had been a long number of years since your father had taken a drink?

A. Yes sir, about six years.

Q. Well, you say he hasn't taken a drink since then?

A. Not that I know of.

Q. You haven't heard?

A. No sir.

[fol. 112] D. J. HOWARD, witness for the movant, having been duly sworn, testified:

Direct examination.

Mr. Guthrie:

Q. What are your initials, Mr. Howard?

A. D. J.

Q. Where are you living?

A. Horry County.

Q. You married Mr. Elmore's daughter?

A. Yes sir.

Q. He has been with you since the 29th of October, 1936—been making that his home?

A. Well, off and on until the last year and a half.

Q. Mr. Howard, did you ever live in Lumberton?

A. Yes sir.

Q. How long?

A. I stayed there in Lumberton from November 31st to the 20th day of May, 1935.

Q. And then you moved to South Carolina?

A. Yes sir.

Q. Do you know Howard Nye?

A. When I see him.

Q. Do you know L. C. Mayers?

A. I just know him.

Q. What is his business?

A. I don't know.

Q. Do you know whether or not of your own knowledge [fol. 113] he was in the employment of Howard Nye?

A. No sir, I don't know.

Q. Were you at home on the morning of April the 18th of this year?

A. Yes sir.

Q. And Mr. Elmore?

A. Well, he was with me, and me and him left home together and he went to Mr. Anderson's to work and I went to Mr. O. H. Chestnut's.

Q. What time did you leave home?

A. About five-thirty.

Q. Where did you part company?

A. At the schoolhouse.

Q. And you went on to your work and he went on to Mr. Bradley Anderson's?

A. Yes sir.

Q. When was the last time you saw him?

A. I saw him at six o'clock going towards Lumberton with Mayers when I seen him.

Q. Had you seen Mayers prior to the time you saw him with Mr. Elmore in the car?

A. He stopped me and asked me if I knowed Mr. Elmore, and I told him I married his daughter, and he said, 'Where is he at now?' and I said, 'What do you want to see him about—anything concerning that suit?' and he said, 'No, nothing concerning that suit. I want to see if we can get [fol. 114] together and buy some of this timber down here,' and then I told him where he was at.

Q. Now from the time he left you then, about how much time had elapsed until you saw him again?

A. Along about two hours.

Q. Did he stop?

A. No sir.

Q. Did anybody say anything?

A. No sir. I was about twenty-five yards from the road when they passed.

Q. You saw him the next afternoon, didn't you?

A. In the car.

Q. How far were you from home?

A. About two miles.

Q. Was Mr. Elmore in the car with him?

A. Yes sir.

Q. Anybody else?

A. No sir, just them two.

Q. Did you go home that afternoon?

A. Yes sir, about six o'clock.

Q. Was Mayers there?

A. No sir.

Q. What was Mr. Elmore's condition when he came home?

A. He looked like he was pretty doped up on liquor. He brought some liquor—about that much (measuring about two inches with his fingers) in a half-pint bottle and told [fol. 115] me, 'You can drink it if you want it. I am sick enough to never drink it again.'

Q. Did he tell you where he got it?

A. Mr. Mayers.

Q. What kind of liquor was it?

A. Yellow looking.

Q. Did you taste that liquor?

A. Yes sir.

Q. How did it taste?

A. I couldn't hardly tell you.

Q. Did you drink it or throw it away?

A. I drank it.

Q. Now what was Mr. Elmore's condition that night?

A. Well, he didn't have much to say that night.

Q. What was his state of mind?

A. He didn't talk much. Said he was sick and give out and wanted to rest.

Q. Did you ask him where he had been?

A. No sir.

Q. When did you first find out where he had been?

A. He told me the next night after he got back home. He told me he had been up to see Mr. Nye and he wanted him to drop that case against the BC people.

Q. Did he say why?

A. On account of some of his folks married into the BC Company.

[fol. 116] Q. Did he tell you he had signed any papers?

A. He didn't, but he said he had dropped the suit.

Q. What was his mental and physical condition?

A. He was in bad condition—he didn't eat nothing and never eat nothing much for a couple of weeks.

Q. How did it affect you?

A. I didn't get enough.

## Cross-examination.

Mr. McNeill:

Q. How much did you get?

A. (Measuring on his finger, showing about an inch and a half.) That much out of a half-pint bottle.

## Cross-examination.

Judge Varser:

Q. Mr. Howard, he told you what he had done as a result of being in Lumberton the second day after he got back, and he was perfectly able mentally to tell you what he had done then, and you found out later he told you correct?

A. He told me what he had done.

Q. And you found out later that he was right?

A. Yes sir.

Q. And he was able then to recollect what he had done?

A. I don't know about that.

Q. Well, you found out it was correct, didn't you?

A. He told me what he had done. And I didn't have no reason not to believe it.

[fols. 117-129] Q. But you found out later he had told you correct?

A. I found out he had dropped the suit.

Q. This patrolman, or whatever they may call them in South Carolina, he is the same man who went up there twice?

A. I don't know. I know the rural policeman came.

Q. What is his name?

A. Gore.

Q. And he has been the rural policeman for some time, hasn't he?

A. I believe so.

## Redirect examination.

Mr. Guthrie:

Q. Is Mr. Gore in the courtroom?

A. No.

Q. The first time he didn't have any trouble finding him without Mr. Gore, and the second time Mr. Gore had to go with him to show him. You were not there when Mr.



Mayers came back the Monday after I had been there on Saturday?

A. No sir.

[fol. 130]

**MOTION TO DISMISS**

At This Point, Movant Rests, and thereupon Judge Varser on behalf of respondent R. H. Nye moved to dismiss the petition and order to show cause upon the grounds that the evidence offered by the movant does not constitute contempt within the law, or within the jurisdiction of this Court. The motion was overruled, and Judge Varser in behalf of respondent Nye excepts. Mr. McNeill, also, on behalf of respondent Mayers excepts.

[fol. 131] MISS ANNIE McLEAN, witness for the respondents, having been duly sworn, testified:

**Direct examination.**

**Judge Varser:**

Q. By whom have you been employed throughout the year?

A. Johnson & Floyd of Lumberton.

Q. Is that the firm of lawyers with which Mr. Timberlake is connected?

A. Yes sir.

Q. Where is the office located with reference to the court house?

A. In front of the court house on Main Street.

Q. Is that the place that used to be the bank and then the post office?

A. Yes sir.

Q. There has been something said at this hearing—I don't believe you were in here this morning—about some papers that Mr. W. H. Elmore, the gentleman sitting third from the end on the front row, and Mr. Elmore contends that at the time he was either drunk or under the influence of liquor. Will you tell us just what you remember?

A. Mr. Elmore was in the office when I went to work that morning, and when I went in Mr. Nye told me he had some papers and wanted me to make an affidavit as to the papers,

and I read the papers to Mr. Elmore, they were copies of letters, and took his deposition.

Q. Did anybody dictate the papers?

[fol. 132] Q. I didn't write the letters. I wrote the affidavit on it.

Q. What were the papers that you wrote? Were they the papers that were filed with Mr. Skipper?

A. No sir. Those that I took the affidavit—one to Judge Hayes and one to Mr. Guthrie.

Q. Now, was Mr. Timberlake in the office?

A. In his office in the office where I work.

Q. I believe your office has two rooms and Mr. E. R. Johnson has the one to your left?

A. Yes sir.

Q. Where was it that Mr. Elmore was with you?

A. In the filing room.

Q. At that time did you see enough of Mr. Elmore, this old gentleman here, to say whether you thought he was drunk.

Objection by Mr. Guthrie overruled.

A. I was with Mr. Elmore for some 15 or 20 minutes. During that time I read the affidavit to him. When I read the affidavit to him he said that it was true and correct. If he had had any liquor I couldn't tell it. I don't think he had.

Q. Did you see any signs indicating to you that he was not himself?

A. No sir.

[fol. 133] Q. Did you see him take any paper to the court house?

A. They went to the court house from our office.

Q. Did you see him about the time they entered the court house?

A. I saw him just before they got there.

Q. Did that put you in the library looking out the window?

A. Yes sir.

Q. Did Nye have the paper or did Elmore have it?

A. I don't know.

Q. You couldn't tell?

A. No sir.

Q. Did you see them any more after that?

A. No sir.

Q. Have you seen Mr. Elmore in your office since that time?

A. No sir.

Cross-examination.

Mr. Guthrie:

Q. Miss Annie, are you licensed to practice law?

A. No sir.

Q. How long have you been working for this firm?

A. Since April, 1934.

Q. You keep talking about an affidavit of Mr. Elmore. Are you talking about this gentleman? I haven't seen any such affidavit.

A. It was an affidavit on each of those letters that that [fol. 134] was a true and correct copy of the original letter.

By the Court: Do you know what became of that affidavit?

A. I do not.

By the Court: Would it refresh your recollection to see the letter addressed to the court? (Looking for the letter.)

A. The affidavit appeared on the copy and not on the original letters.

By the Court: You don't know what went with the affidavit?

A. I didn't see them any more.

By the Court: Maybe you are confusing that with the affidavit by the Clerk?

A. I don't suppose it could have been that. I don't know.

(Judge Varser looks through papers and hands the copies of letters and affidavit to Mr. Guthrie.)

Q. Is that what you were talking about? (Showing Miss McLean the copies.)

A. Yes sir.

Q. That is the letter addressed to me. Who put that on the office copy?

A. I did.

Q. Well, isn't it on the original?

A. I didn't put it on the original.

Q. Well, why didn't you put it on the original?

A. There were an original and three copies.

Q. Well, do you usually put that verification on the office copies?

[fol. 135] A. No.

Q. How did you happen to put it on this?

A. I was asked to do it.

Q. By whom?

A. By Mr. Nye and Mr. Elmore.

By the Court: You just took the affidavit for the copies of these letters?

A. Yes sir.

Q. You wrote this letter? (Handing her letter.)

A. No sir, I didn't.

By the Court: She didn't write any of the letters—all she did was take Mr. Elmore's affidavit.

Q. Who wrote that?

A. I don't know.

Q. Do you know whose handwriting that 'Box 53' is?

A. No sir.

Q. Did Mr. Nye have these?

A. I didn't see them.

Q. Well, you compared those with the original?

A. Yes sir.

Q. Where did you get the original to compare?

A. It was there and I saw Mr. Elmore sign it.

Q. Where did you get this copy paper that the affidavit is on?

A. I don't know who made the paper.

Q. I didn't ask who made the paper.

[fol. 136] Judge Varser: She said she didn't know where the letters came from.

A. Mr. Nye handed it to me and I wrote the affidavit and handed it to Mr. Elmore and Mr. Elmore signed it. He also signed the original in my presence.

Q. What kind of typewriter do you have in your office?

A. We have two Underwoods and a Royal.

Q. There are more than one?

A. Yes sir.

Q. You have an Underwood?

A. Yes.

Q. What do you write on?

By the Court: You took the affidavit on a carbon copy of the original letter?



A. Yes sir.

Q. You don't know who wrote it?

A. It was written when I saw it. I don't know who wrote it.

Q. What time do you go to work?

A. Nine o'clock.

Q. Were you expecting Mr. Nye up there?

A. No.

Q. Don't you know he was there the day before?

A. I don't know whether he was or not.

Q. You don't mean to say he wasn't there on the 16th, 17th, or 18th of April?

A. I don't know.

[fol. 137] Q. Do you keep the books of the concern?

A. We don't have any books.

Q. Who did you charge that job up to?

A. I didn't charge it to anybody.

Q. Who paid you?

A. There were no notary fees paid.

Q. Has your office so far as you know rendered Mr. Nye or anybody else a bill for any services in connection with it?

A. Not that I know of.

Q. You keep no books at all?

A. We keep a record book.

Q. Isn't anything charged on your books to Mr. Nye for services rendered?

A. I don't know.

Q. Mr. Nye testified in a former hearing that those letters were written in Mr. Timberlake's office, and that he paid the bill. Do you know how much?

A. I do not.

Q. P. O. Box 53 is R. H. Nye?

A. I don't know.

By the Court: He admitted that it is.

Q. I understand you testify that you never saw this envelope and letter?

A. I saw the letter, I saw Mr. Elmore sign it, but I didn't see the envelope.

[fol. 138] Q. After he signed this paper, did you back that envelope? Did you address the envelope?

A. Yes, sir, but I didn't put box 53 on there.

Q. You wrote 'W. H. Elmore, Lumberton, N. C.'?

A. Yes sir.

Q. You have letterheads and envelopes there in the office—where did this envelope come from?

A. It evidently came from the post office. It is a stamped envelope. I addressed the envelopes that were given to me.

Q. Who gave them to you? Which one handed you this envelope?

A. I don't know—I don't remember.

Q. You don't remember who it was handed it to you?

A. I don't know for certain.

Q. You were ashamed to put the firm name up there, so you used this post office envelope?

A. The firm of Johnson & Floyd had nothing to do with that letter.

Q. You say they didn't and Mr. Nye said sometime ago that they did.

A. All I know is I didn't write it.

Q. Does Mr. Timberlake write on a typewriter?

A. Yes sir.

Q. Mr. Johnson?

A. Yes sir.

Q. So they could write a letter without your knowing it?

A. Yes sir.

[fol. 139] Q. This letter is written on plain paper. Do you keep any of this kind of paper in your office?

A. We have some plain paper and I don't know whether it is exactly like that or not.

Objection by Judge Varser and Mr. McNeill overruled.  
By the Court: Go on.

Q. Miss Annie, I believe I wrote you a letter, didn't I?

A. Yes sir.

Q. You didn't even answer, did you?

A. No sir.

Q. Didn't do me that courtesy?

A. No sir.

Q. By the way, you said that so far as you could discover Mr. Elmore was not drinking. How can you tell when a man is drinking?

A. Well, you can smell it, or he will stagger or have a different appearance from a man not drinking.

Q. Did you draw an affidavit for Albert Elmore?

A. Yes.

Q. Who dictated that?

A. I probably wrote it myself.

Q. Do you compose the affidavits in your office?

A. Sometimes.

Q. Do you mean you composed this affidavit? (Showing her affidavit of Albert Elmore.)

[fol. 140] Objection by Judge Varser overruled.

A. I didn't write that.

Q. Did you write the letter to Judge Hayes?

A. I did not.

Q. Well, the fact is you don't know much about it—where they were written you don't know, and Mr. Elmore swore to it. You saw him put his signature to that original?

A. Yes sir.

Q. He had it prepared?

A. Mr. Elmore was already there when I came in.

Q. Had Mr. Timberlake come in?

A. Yes sir.

Q. How long?

A. I don't know.

Q. Did he go into Mr. Timberlake's office?

A. Not after I got there.

Q. Have you ever had any conversations with Mr. Timberlake about this?

A. We discussed it since we were subpoenaed here.

Q. You were subpoenaed before but you would not come to the other hearing? Who told you not to come?

A. I was informed it was not compulsory.

Q. By whom?

A. Mr. Johnson. He told me we were not required to go if it was over a hundred miles.

Q. No lawyer ever told you that?

[fol. 141] A. Mr. Johnson said it was not compulsory.

Q. Well, why did you come now?

A. I changed my mind—I wanted to come.

Q. You wanted to come and help Mr. Nye?

A. I don't know whether I am helping or not, but I wanted to come.

Q. You just wanted to come, and now you are up here without any subpoena served on you at all. How did you come?

A. With Mr. Timberlake.

Q. He asked you to come, didn't he?

A. No.

Q. Your curiosity just got up and you came now, isn't that it?

A. (No answer.)

Cross-examination.

Mr. McNeill:

Q. Was Mr. Mayers in the office at any time Mr. Elmore and Mr. Nye were there?

A. No sir.

Q. Do you ever recall seeing Mr. Mayers in your office?

A. No sir. I have seen Mr. Mayers in the office, but not at the time Mr. Elmore was there.

Recross-examination.

Mr. Guthrie:

Q. Did you ever see Albert Elmore in the office?

A. Yes.

Q. When you took that affidavit who brought Albert to [fol. 142] that office?

A. I don't know.

Q. About this boy—who brought that boy up there?

A. I don't know.

Q. The time you drew that affidavit and wrote that letter?

A. I don't remember. I didn't sign that affidavit you had here a few minutes ago.

Q. Did you write that?

A. No sir.

Q. Did you fill out a blank for this final account at all in connection with this—a paper which looks like that? (Showing her final account.)

A. I did not.

Q. Then, you don't know anything about that?

A. No sir.

Redirect examination.

Judge Varser:

Q. Miss McLean, Mr. Guthrie has asked you about a letter he wrote you. What did you do with it?

A. I gave it to Mr. Timberlake.



Q. Did you talk with Mr. Johnson about it?

A. No sir.

Q. And nothing was done about it?

A. No sir.

[fol. 143] MISS MATTIE JENKINS, witness for the respondents, having been duly sworn, testified:

Direct examination.

Judge Varser:

Q. What has been your position in the Clerk's office at Lumberton?

A. Deputy.

Q. How long have you been there?

A. Since October, 1935.

Q. So that would be that you were deputy just a short while ago under Mr. Skipper?

A. Yes sir.

Q. Then you continued as deputy under his successor, Miss Theresa Patterson?

A. Yes sir.

Q. Do you remember any occasion when Mr. W. H. Elmore came to the Clerk's office to see Mr. Skipper?

A. Yes sir.

Q. Do you recall what you were doing?

A. I was either making up a bank deposit or working on the cash book.

Q. Do you stand up at a tall desk?

A. Yes sir.

Q. What did Mr. Elmore do and say and what did Mr. Skipper say?

[fol. 144] A. He brought in a final account and told Mr. Skipper he wanted to close the matter up because his lawyer Mr. Carlyle—

Q. What did Mr. Skipper say?

A. He said 'Good morning, Henry'—'Where are you living?'

Objection by Mr. Guthrie overruled.

Q. What did Mr. Elmore say to the Clerk in reply?

A. He said, 'I am living in South Carolina now.'

Q. What was said, if anything, after that in addition to what you have already said about the final account?

A. Mr. Skipper asked him if he was satisfied with it and if he wanted to close it up and he told him he was. There was no one else in the office.

Q. Did you see Mr. Nye there?

A. Yes sir.

Q. Did Mr. Nye say anything?

A. No sir.

Q. Who paid the dollar?

A. Mr. Elmore gave Mr. Skipper the dollar.

Q. Have you looked at your records?

A. Yes sir.

By the Court: Do you remember distinctly that Mr. Elmore handed the dollar to him?

A. Mr. Elmore handed Mr. Skipper the dollar.

By the Court: And did you see where he got it?

A. No.

[fol. 145] Q. Did you observe Mr. Elmore at that time throughout the transaction? Was he drunk or sober?

A. I don't think Mr. Elmore was drunk.

Q. From your own standpoint what is your own recollection as to his drunkenness or soberness?

A. He was sober.

Q. Did he remain in the office?

A. No, he went out.

Q. Mr. Skipper has since died?

A. Yes.

Q. When was the date of his death?

A. August 1st, 1939.

Cross-examination.

Mr. Guthrie:

(Mr. Guthrie looks for letter addressed to Mr. Skipper and returned to Mr. Guthrie with a footnote. The letter is not located.)

Q. And you say Mr. Elmore handed him that paper? That final account?

A. Yes.

Q. Howard Nye was in the office?

A. Yes. Mr. Elmore handed it to him and he said, 'Henry, is this what you want to do?'

Q. Well you all knew in that office he had a suit against the BC Company?

A. Yes sir.

[fol. 146] Q. Did Mr. Skipper ask him anything about what became of the suit?

A. He asked if he was satisfied, if he was willing to close the administration and he told him he was.

Q. Do you know anything about that telegram sent to me? (Showing telegram from Mr. Skipper.)

A. No sir.

By the Court: Was there any other deputy in there?

A. —.

Q. This purported telegram sent to me collect (showing telegram)—Mr. Skipper wired me 'I don't remember who if anyone was with Elmore'—

Objection by Judge Varser sustained.

Q. How do you happen to remember this account? How many administration accounts a year do you handle?

A. I don't know.

Q. You remember the day in great detail. How is it you happen to remember?

A. Well, I knew the suit was pending.

Q. Were you in the office the day I came down there and took a voluntary non-suit?

A. I don't remember.

Q. But you remember with very great particulars and detail about this conversation between Mr. Skipper, who is now dead, and Mr. Elmore?

A. Yes, I do.

[fol. 147] Q. And you know he was perfectly sober?

A. Mr. Skipper would not have let him file it if he had not been sober.

Q. What did Mr. Nye have to say?

A. He had nothing to say.

Q. What was he doing over there?

A. He came in with Mr. Elmore.

Q. Was Mr. Elmore so drunk he had to have someone come with him?

A. I can't answer that.

Q. But Mr. Nye just walked in like a ghost with him. Did Mr. Nye sit down?

A. I don't remember.

Q. Did Mr. Nye hold him up or did he carry him to the door and turn him loose? And Mr. Nye just walked in there to witness this transaction, and Mr. Skipper and Mr. Nye never spoke?

A. Yes, he said something to both of us.

Q. What was Mr. Nye's business there?

A. I don't know what his business was.

Q. He just came in with Mr. Elmore?

A. Yes sir.

Q. Who did you hand the receipt for this dollar?

A. Mr. Skipper handed this receipt to Mr. Elmore.

Q. What did he do with it?

A. I don't know.

[fol. 148] Q. Don't you know the receipt was handed to Mr. Howard Nye? Would you be surprised to know that he testified that he paid the dollar?

A. I saw Mr. Elmore give Mr. Skipper the dollar, and the receipt was given to Mr. Henry Elmore.

Q. Are you under any subpoena to come up here?

A. No sir.

Q. Well, why did you volunteer to come?

A. I came because I was asked to come.

Q. By whom?

A. By Mr. Nye.

Q. Who paid your expenses?

A. There are no expenses yet that I know of.

Q. Whose car did you ride in?

A. Mr. Timberlake's.

Q. And you came because Mr. Howard Nye asked you to come?

A. Yes sir.

Q. Who paid for your lunch?

A. Mr. Carwell.

Q. Is he a Lumberton gentleman?

A. Yes.

Q. Did Mr. Nye dine with you today?

A. No.

Redirect examination.

Judge Varser:

Q. Miss Jenkins, when you were requested to come, did [fol. 149] you report it to your employer?



A. I asked Miss Patterson if it would be all right to come and she said it would be perfectly all right.

Q. And you came in the car with Mr. Timberlake and Miss McLean?

A. Yes.

Recross-examination.

Mr. Guthrie:

Q. Just Mr. Nye asked you to come?

A. Yes.

Recross-examination.

Mr. McNeill:

Q. How near did you get to Mr. Elmore while he was in the office—was it very near?

A. Yes, very near.

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[fol. 150] L. C. MAYERS, respondent, having been duly sworn, testified:

Direct examination.

Mr. McNeill:

Q. Mr. Mayers, where were you living on the 18th day of April, 1939?

A. Living at what is known as Hunters' Lodge.

Q. Who does that farm belong to?

A. Mr. R. H. Nye.

Q. Are you a tenant on that farm?

A. Yes sir.

Q. How long have you been there?

A. Soon be two years.

Q. What was your business before that time?

A. I had been farming for the last seven years.

Q. What did you do before that?

A. I ran a store in the mill village.

Q. Are you also a carpenter?

A. Yes sir.

Q. That is, odd times?

A. Yes sir.

Q. Did you know Mr. W. H. Elmore and his family?

A. Yes sir.

Q. Where did you first know them?

A. At Lumberton.

Q. Did you have occasion to see them and talk to them?

A. He traded in my store.

[fol. 151] Q. Did you live there at the mill before Mr. Elmore or after he left?

A. I think I left first.

Q. You didn't know him anywhere except out at the mill?

A. That's all.

Q. Do you recall about when you first heard anything about this law suit against the BC Remedy Company? About what time of this year?

A. Since Christmas or January.

Q. Along about January?

A. January, February or something.

Q. —.

A. Mr. Nye he come out there one Saturday evening. He paid me \$25.00 for the job.

Q. On this contract job?

A. Yes sir.

Q. Did you talk with him then about this law suit?

A. Well, he mentioned something about the law suit.

Q. Did he ask you if you knew these people?

A. Yes sir.

Q. What did you tell him?

A. Yes sir, I have known them for a good many years.

Q. Did he say anything about the law suit? What interests he had?

A. He said that his daughter had married in the family, and that he would like to see Mr. Elmore and talk with him.

[fol. 152] Q. Was that in February?

A. Either in January or February.

By the Court: Well, did he say anything else at that time about it?

A. No sir.

Q. Did you tell him anything with reference to the Elmore family? Did he ask you anything further?

A. Well, he asked me about the habits of James.

Q. Asked you if you knew him?

A. Yes sir.

Q. Well, now did he say anything about whether or not the suit was pending?

A. He said that his daughter had married in the family—that he would be glad if it was dropped—that Mr. Carlyle, I believe he said, that Mr. Carlyle was prosecuting the case as well as he remembered it.

Q. Well, Mr. Mayers, did you later see Mr. Nye and have a talk with him about it?

A. The next time I talked to Mr. Nye he said that Mr. Carlyle had dropped the case, that Mr. Carlyle said there was nothing to it.

Q. Did you, in the meantime, see Mr. Elmore anywhere?

A. It was sometimes after that—I can't recall exactly when it was I saw Mr. Elmore over at town one Saturday evening. I happened to run up with him right on the corner [fol. 153] known as the Carwell building. I just happened to run up on him and shook hands with him. I said, 'By the way, Mr. Elmore, is there any gum timber down in your country, down where you stay?' He said, 'I really don't know—there should be lots of it. Come down and see.' I said, 'Probably I will.'

Q. Why did you have that on your mind?

A. At that time I had a contract to clean up this bottom for Mr. Nye and he gave me the timber. So several people come along and stopped and wanted to buy the gum timber.

Q. Then, later on did you see Mr. Nye?

A. Well, a short time after that I seen Mr. Nye and he said an attorney up at Durham by the name of Mr. Guthrie had started the suit again. I said, 'What suit?' and he said, 'That same old suit.' I said to him, 'By the way, I saw Mr. Elmore last week, last Saturday, might have been Saturday a week ago,' and he says, 'Well why didn't you bring him over to see me?' and I said, 'Well, he was in a hurry and I didn't have time—'

Objection by Mr. Guthrie overruled.

By the Court: Go ahead.

A. And the car was right ready to go back home, and it was late Saturday evening anyway, and Mr. Elmore invited me down to see him, and I told him I might be down in two or three weeks.

Q. And that is what you told Mr. Nye?

[fol. 154] A. Yes sir.

Q. And you also told him——?

A. Mr. Nye told me when I went down there to see Mr. Elmore to tell him he wanted to see him. I told him I would go if I had a chance to go see him about the lumber I would ask him.

Q. Did you ask him about the BC case?

A. No sir, I never talked about it.

Q. Did you say anything to Mr. Nye about talking about the BC case if you went to South Carolina?

A. I disremember. As well as I remember Mr. Nye said, 'If you happen to see Mr. Elmore, tell him I want to see him and talk with him,' and I said, 'If I get to see him I will tell him.'

Q. When did you go?

A. It was on a Tuesday, April 18th, as well as I remember.

Q. Well, go ahead and tell us just what you did?

A. I got in my car and drove down to see Mr. Elmore.

Q. Which way did you go?

A. I went by way of Laurens.

Q. Did you see anybody?

A. Yes.

Q. Where else did you go?

A. I went from Laurens to Nichols, and from Nichols to Loris and a place called Daisy.

Q. Who did you see?

[fol. 155] A. When I got to Daisy I had to inquire of a filling station, Arch Spivey's, if he recalled a gentleman by the name of Mr. Elmore. He said, 'Yes, I know of him, but to save my life I can't tell you where he is, and about that time he says, "There is a man here in the station called by the name of Harvey. I know he can tell you where he lives because there was some folks down here a month or two ago and he went with them down there." Mr. Harvey came up and spoke and told me which way to go, and said, "If you are coming right back I will go with you." I said, "Well, I was sorta figuring on spending the night, it is so late now." He said, "Well, I won't go.'

Q. Were any other persons there?

A. There was another gentleman there by the name of——

Q. Did you go on looking for him?

A. Yes sir. I went on down the road and I found his son-in-law Mr. Howard and I asked him if he knowed Mr. W. H.



Elmore, and he says, 'Yes, I ought to know him. I married his daughter.' Well it popped in my mind right quick, and I said, 'Which one of his daughters?' and he said, 'Annie.' And I said, 'Does Mr. Elmore live around here?' and he said, 'He lives about two miles from here. What do you want to see him about—anything concerning that law suit?' I said, 'No, I spoke to him about a week ago about some gum timber and he said he would see about the timber.' He [fol. 156] said, 'He is down there not over three hundred yards. You'll find him in a ditch.' I told him who I was, and I said, 'If you married Annie I ought to know you,' and I said, 'Well, you married Annie about the time I left West Lumberton,' so I rode on up to where Mr. Elmore was.

Q. Did you tell him what your business was? Mr. Howard I mean?

A. Yes sir. I told him I was trying to locate some gum timber and he said there was none there that he knew of. I drove on down to Mr. Elmore. I got out of the car and he got out of the ditch and we said we were glad to see each other. We talked on a few minutes asking how his folks was, and he asked how mine was, and then we got to talking about the timber and finally we got to talking then about this law suit. He said that he was just worried to death about that same old law suit about James, and that he was just sick and tired of it, and I said, 'Well, by the way, that reminds me that Mr. Howard Nye told me if I ever got to see you again to tell you that he wanted to see you and talk to you.' He said, 'How come? What about?' I said, 'I declare I can't tell you, it might be about this law suit.' He said, 'Well, how about you carrying me down there to see Mr. Nye tonight.' I said, 'Well it is getting mighty late now. Really I come to spend the night with you.' He said, 'No, I would rather go now if you will carry me and bring [fol. 157] me back to night—I will go with you.' I said, 'Well, if that is your wishes, I will do my best to carry you there and back.'

Q. Did he say anything about Mr. Carlyle?

A. He said that Mr. Carlyle had dropped the case and that Mr. Guthrie had picked it up. He had been up to Durham, and that they were fixing to make him come again and that he wasn't able to come physically or financially and that he was worried to death.

Q. How was he dressed?

A. He had on boots and overalls and an overall jumper. He had his jumper outside of the ditch. I said, 'Don't you want to go home and dress?' He said, 'No, if I go home my daughter won't want me to go to Lumberton.' I said, 'Well, that's going to look sorta bad then.' He said, 'Well, we are coming back tonight.' I said, 'Well, it is perfectly all right to me for you not to go home.' So we got up in the car and went on.

Q. Do you recall whether you stopped?

A. We stopped at a cafe and had supper.

Q. Near Lumberton?

A. Yes, about within two miles from town.

Q. Was it dark then?

A. I judge it was just good dusk dark.

(Discussion about the length of Mr. Mayer's examination. Mr. Timberlake is put on the stand, and Mr. Mayers' examination is to be resumed later, because Mr. Timberlake couldn't stay long.)

[fol. 158] W. E. TIMBERLAKE, witness for the respondents, having been duly sworn, testified:

Direct examination.

Judge Varser:

Q. Do you live in Lumberton?

A. Yes sir.

Q. How long have you been a practicing attorney?

A. Five years this past June.

Q. You used to live in Lumberton?

A. Yes sir, I taught in the High School there and coached athletics.

Q. You are connected with the firm of Johnson & Floyd?

A. Yes sir, I am a member of it.

Q. And you and Mr. Johnson constitute that firm?

A. Yes sir.

Q. Do you know Mr. W. H. Elmore and Mr. Howard Nye?

A. Yes sir.

Q. Miss Annie McLean works in your office?

A. Yes sir, she has been there ever since I have been there. Mr. Johnson's former associate had died.

Q. You know that certain papers were drawn in your office and were then carried by either Mr. Elmore or Mr. Nye to the Clerk's office and there entered by Mr. Skipper. State what you recall.

A. Yes sir. I was called by long distance by Mr. Nye on the night before April 19th. I was at that time spending the nights at Laurinburg and commuting to Lumberton. I [fol. 159] told him it would be impossible for me to come. He asked me to come early the next morning and I told him I would. I got there just a short time before eight o'clock. I had a bite of breakfast in a cafe and went to the office, and he and Mr. Elmore, who I had not seen before, and between the two of them they gave me the history of the suit that was pending in the Federal Court, and Mr. Elmore said that he wanted to get rid of the whole thing, that he didn't have any faith in it. First Mr. Nye explained the whole thing to me. I then turned to Mr. Elmore for his statement of it, and that is the substance of what he told me. I told him that my opinion was that the best thing for him to do was to take the matter up with his lawyer. He wanted me to go on and prepare the papers. Mr. Nye told me the substance of what he wanted the letter to contain so I drafted the letter addressed to Mr. Guthrie, did the letter to Judge Hayes, and I drafted the final account, and it was approximately nine o'clock then. I had to do it myself on my typewriter in my office. I think Mr. Nye requested that I make copies of the letter. He then asked me if I would give him the whole thing as it was. I gave it to him. At that time Miss McLean came in and said somebody wanted to see me and they left. That is, they left my office.

Q. What was Mr. Elmore's condition?

A. His condition, so far as I can see, was practically the same as it is today. I sat at my desk like this, and he sat [fol. 160] in a chair just about as far from me as that chair right there. He had no appearance of being under the influence of liquor, nor could I tell he had had a drink. After I had prepared the papers I read them out loud and Mr. Nye said they were all right, and I told him this final account would be sufficient to discharge him as administrator.

Q. Did you have any feeling or suspicion that Mr. Elmore was not himself?

A. No sir. He was perfectly normal. If he had been drinking I could not tell it. He was in my office the length



of time for them to explain what they wanted. I prepared the papers. I would say he was in my office fully from thirty to forty-five minutes.

Q. Would you have prepared any papers for him if you had any impression he was drunk?

A. No sir, I would not.

Q. You spoke of spending your nights at Laurinburg, at that time. Were you and your family living there then?

A. Yes sir. We were to move to Lumberton the first of July.

Q. Mrs. Timberlake was a resident of Laurinburg when you were married?

A. Yes sir.

#### Cross-examination.

Mr. Guthrie:

Q. How long have you been practicing law?

A. Since the 20th of June, 1934.

[fol. 161] Q. Have you ever handled any other business besides this for Mr. Nye?

A. I have represented Mr. Nye for about three years. I don't reckon a week has passed in three years that I haven't done some business for him.

Q. Does he have a lot of legal business?

A. Letters, contracts and his leases requiring certificates of title.

Q. He is quite a prominent man around Lumberton, isn't he?

A. Well, I would say so, yes sir.

Q. He is a man of large influence?

A. I don't know, I think he is a fairly influential man.

Q. And extremely well-to-do financially?

A. I don't know.

Q. Mr. Timberlake, are you under any subpoena to be here now?

A. No sir.

Q. You were once subpoenaed?

A. Yes sir.

Q. You then took the position you would not come in answer, through your attorney, Mr. Johnson, because you were 140 miles from the seat of the Court. Well, why did you volunteer to come now?



A. Well, Mr. Guthrie, I was advised that this man had come up here and made the statement that he was under the influence of liquor, and I knew that was an error, and at [fol. 162] the time I had a subpoena I knew nothing about it.

Q. Have you seen the petition upon which order to show cause was filed?

A. Yes sir.

Q. Mr. Timberlake, you never came near Durham until you saw in that petition that the petitioner was asking that you be indicted for a conspiracy. It was filed by me.

A. No sir, I haven't seen the petition.

Q. You don't know if that is in a petition that you be indicted for a conspiracy?

A. No sir. The petition I thought you had in mind was the one asking that the administrator be reinstated.

Q. Mr. Timberlake, this is a voluntary act on your part?

A. Yes sir, it is at the request of Mr. Nye.

Q. Didn't you write me under date of July 25th, 1939, and say this: 'The affidavit prepared and filed by Mr. Elmore, and which is referred to in your letter, was prepared by me as an attorney upon facts given me by my client. \* \* \* So far as filing a copy of this letter with the Clerk of Federal Court at Greensboro, I shall not do so as I am not a party to that action and it is not my intention to inject myself voluntarily into it.'

A. That is a portion of the letter.

Q. So you have injected yourself into it?

Objection by Judge Varser overruled.

Q. And you have voluntarily injected yourself into it? [fol. 163] A. Yes sir. Well, Mr. Nye came to me and requested that I come here for the purpose of giving testimony.

Q. What did he pay you?

A. I charged him \$10.00 for drafting the letters.

Q. And he paid it?

A. Yes sir.

Q. Old man Elmore did not pay that?

A. No sir.

Q. (Showing the letter of the 19th.) Is that the letter you wrote up?

A. As I remember it, Mr. Guthrie, that is the letter.

Q. Do you have a letterhead?

A. Yes sir.

Q. Why did you use plain paper?

A. Because it wasn't to be signed by our firm.

Q. Who produced the envelope?

A. I never did see the envelope.

Q. Do you know where that envelope came from?

A. It is not one of our envelopes. When I had finished the work of the letters they said it was exactly what they wanted. I then put each letter with three copies with a paper clip on it and Mr. Nye said, 'I will take them just as they are.' They left then and somebody came into my office.

Q. You prepared that affidavit?

A. Which affidavit?

[fol. 164] Q. Of Albert's?

A. Yes, I did.

Q. Who was present when that was prepared?

A. Albert Elmore and Mr. Nye.

Q. Nye was there again?

A. Yes sir.

Q. And your \$10.00 fee covered that paper as well?

A. No sir.

Q. How much did you get for that paper?

A. I don't remember.

Q. You don't know.

A. No sir, I couldn't say.

Q. You testified that you knew there was a suit pending by Mr. Elmore against the BC Remedy Company. You knew it had been pending in the State Court?

A. Mr. Carlyle had been talking to me when the suit was first started.

Q. But you didn't know it had gotten in the Federal Court?

A. No sir.

Q. When Nye brought Mr. Elmore to the office it was about eight o'clock?

A. I came down early. He called me the night before and asked me if I would come early the next morning, and I told him that I would, and I was there sometime around between seven and eight and Mr. Nye was in my office around eight o'clock.

[fol. 165] Q. But he had spoken to you earlier in the week?

A. He didn't give me the nature of the work.

Q. Hadn't he told you prior to that time? You never heard of that until he called you that night?

A. Yes sir. He asked if I could come to Lumberton, and I told him it would be impossible.

Q. Now, as I understand it, you asked old man Elmore why he didn't take it up with his lawyer?

A. Yes sir. When they took it up with me, I turned to Mr. Elmore and I said, 'I think you should take it up with your lawyer.'

Q. But instead of taking it up with his lawyer you had him dismiss the case, and so you didn't give him time to confer with Mr. Guthrie?

A. Mr. Nye told me what he wanted down there and Mr. Elmore was satisfied and he said that was all right.

Q. At the very same time that you wrote that letter to me did you prepare the final account dismissing him as administrator?

A. I prepared a final account.

Q. That was filed and that is your idea of how the legal profession should be?

A. No sir.

Q. Why then?

A. At their request.

Q. That was your idea of how one lawyer should treat [fol. 166] another, and you never saw me before?

A. No sir.

Q. And you did it for a \$10.00 fee?

A. That is what I charged Mr. Nye.

Redirect examination.

Judge Varser:

Q. When you wrote the papers—the letters and the final account, did you give them any directions or say anything to them about when they should present it to the clerk?

A. No sir, I didn't. I read the final account and both letters and said, 'Is that what you want?' They said, 'Yes sir.' I didn't know about them going to the Clerk.

By the Court: You suggested that the final account should be filed over there and the administration discharged? Who originated that idea?

A. Mr. Nye came into my office and he is the one who gave the history of the whole thing, and Mr. Nye said, 'We want to get him discharged as administrator, and at the

same time we want to write his lawyer at Durham and tell him.'

By the Court: You didn't suggest that he get rid of him as administrator?

A. It was Mr. Nye's request.

By the Court: Does Mr. Elmore impress you as being a man of high, medium or low mentality?

A. Well, I would say he was a man of medium.

[fol. 167] By the Court: He didn't impress you as being not normal?

A. I thought he was perfectly normal. As I said, Mr. Nye came into my office and told me what he wanted prepared, and at that time, so far as I know, Judge, he was a normal person.

By the Court: The language of the letter was your language and not that of Mr. Elmore?

A. They had told me the substance of the letter, and I framed the letter. He said Mr. Carlyle convinced him there was nothing to it.

By the Court: It would be utterly impossible for him to write these letters?

A. Yes sir.

Q. When he left you after you had written them, were you then satisfied these were the wish of Mr. Elmore?

A. Yes sir. That is exactly the reason I read them to him, and as the Judge says, I don't think he could use the English that was in there, and I read them back.

#### Recross-examination.

Mr. Guthrie:

Q. Have you any interest in this litigation?

A. None whatsoever.

Q. Have you any friends with whom you discussed the facts?

A. No sir.

Q. You say you have got no bias towards me?

[fol. 168] Objection by Judge Varser overruled



Q. Didn't you write Judge Hayes or have Mr. Johnson write Judge Hayes that I had written you? What letter did Mr. Johnson have reference to?

A. Well, the first letter that you wrote me.

Q. Did I ever write you more than two letters?

A. No sir.

Q. If you consider that as an insulting letter, read it to the Court.

A. Would the Court like to hear the letter? Well, I will let you read it, Mr. Guthrie.

Objection by Judge Varser overruled.

Q. I have been accused as writing an insulting letter.

A. I didn't answer it.

Q. I know you didn't, but Mr. Johnson did.

Cross-examination.

Mr. McNeill:

Q. Did you see Mr. Mayers that day?

A. No sir, I never saw Mr. Mayers before today.

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[fol. 169] MR. MAYERS, respondent, resumes his testimony:

Direct examination resumed.

Mr. McNeill:

Q. You had gotten as far as the Nye filling station. When you left there where did you go?

A. We stopped at Nyetown and got supper.

By the Court: Let me interrupt just a minute. We have some attorneys in from other cases.

(Discussion of continuing Sears-Roebuck case until the 17th of November.)

By the Court: Go ahead with the evidence.

Q. When you finished supper, where did you and Mr. Elmore go?

A. To the Nye Oil Plant.

Q. Who was there?

A. Mr. Nye and Mr. Barnes, and Mr. and Mrs. Baldwin came directly after we got there.

Q. Was Mr. Nye's secretary there?

A. No sir.

Q. Did you go in?

A. I went to the door and said, 'Mr. Nye, here is a party out here and wants to see you.' Mr. Nye said the boys were checking up and he would be through in a minute. In the course of five minutes Mr. Barnes came out; me and Mr. Elmore was standing out in front of the office. Mr. Barnes shakes hands with Mr. Elmore and asked him where he was living, and he said, 'I am living down in South [fol. 170] Carolina.' Mr. Nye said, 'All right, Mr. Mayers, you and your party come in.' We walks in. Mr. Nye shakes hands with Mr. Elmore. And I said, 'Well, I guess you gentlemen don't want me to hear your conversation, so I'll go out,' and about that time Mr. and Mrs. Baldwin steps up. After awhile Mr. Nye calls me back in and says, 'I have called up a lawyer at Laurinburg and he said he can't attend to our business tonight and it will be tomorrow before he can attend to it. Mr. Elmore wants to know if he can stay with you tonight.'

Q. Was Mr. Elmore present?

A. Yes sir. I said, 'Well, I would love to have him, but I haven't got the room.' He said, 'Well, what about taking him to his son Albert?' He said, 'No, I don't want to go there.'

Q. Who?

A. Mr. Elmore. I said, 'Well, I wouldn't care to go to a hotel and I have no idea Mr. Elmore would want to go, and I am sure I don't want to go.' He said, 'Well, how about all of you going and spending the night at my house? I have got a big house and plenty of bedrooms.' And Mr. Elmore said, 'I will go provided Mr. Mayers will go spend the night with me.' I said, 'I'd like to give my wife word that I am going to spend the night in town.' He said, 'Suppose we go and tell her.' Me and Mr. Nye gets in [fol. 171] his car. We goes to my house to tell my wife I won't be home tonight. We came on back there—we left Mrs. Baldwin in the office with Mr. Elmore until we get back.

Q. How long were you gone?

A. Ten or fifteen minutes. Mr. Nye takes me to his house, he gets out and shows me where to park my car. Then he

goes to show us the bedroom, and he says, 'Now you boys just go make yourselves at home. I have got to go feed my dogs. If you hear anybody coming in, it is me, and I will see you in the morning.' He said, 'I'll meet you in the morning down at Nyetown Cafe.' Next morning we gets up and goes down to the cafe and eats breakfast.

Q. How?

A. I drove my car. Just before we finished up Mr. Nye comes down. He said, 'Have a good night?' Mr. Nye eats his breakfast. Whenever Mr. Nye gets through he and Mr. Elmore gets in Mr. Nye's car goes over town, and I gets in my car and comes to the garage to have some repairs done.

Q. What garage?

A. McLoud's.

Q. Did you tell them where you were going?

A. Yes sir. Mr. Nye says, 'We will meet you at the garage. They were gone about an hour and a half or two hours. They came back and the man had just got through working on the car. Mr. Nye said, 'Did you get your car [fol. 172] fixed?' I said, 'Yes.' He said, 'Take Mr. Elmore back home but don't hurry back.' I said, 'Wait a minute, Mr. Nye, I've got to get some money from you to get the car repaired.' I said, 'Loan me \$10.00 until I get some tobacco sold and I will pay you back,' and he pulled out a \$10.00 bill and gave me. So we starts back. We goes to what is known as the French —, and Mr. Elmore buys him a small bucket—a small tub—of lard, whatever you might call it, and a piece of meat, and me and him didn't stop any more until we got to Mr. Spivey's filling station at Daisy, S. C.

Q. Did you stop at Nichols?

A. No sir. We stopped at Mr. Spivey's and I gets on the outside of the car to keep from spitting on the tanks and washed out my mouth and drinks my Pepsi-Cola, and then me and Mr. Spivey gets up a conversation about farming, and I spoke up and asked him how many farms he had, and I told him, I said, 'What would be the chance of renting a farm? Acreage on the farm is just so small that I can't see hardly how I can live on it.' He said, 'Well, I would rather sell you a farm than rent you one.'

Q. Was Mr. Elmore there then?

A. Yes sir. Me and Mr. Spivey talked and I asked him about his son who used to trade with me.

Q. Did you talk about a bond that had been made by you or anyone?

[fol. 173] Objection by Mr. Guthrie sustained.

Q. Did Elmore come into the conversation?

A. Every now and then he would throw in a word.

Q. Did he join in the conversation about his son?

A. No. He talked to Mr. Spivey. He was the one talked about the boy.

Q. Was any other person present?

A. Yes sir. Fellow Tillman Hardy.

Q. Is this the same man? (Indicating Mr. Hardy.)

A. Yes sir, and a fellow by the name of Harris. Well, I know Mr. Hardy spoke to him, but I don't believe Mr. Harris did.

Q. Where did you go then?

A. I went on straight down the road where Mr. Elmore stayed. He is living with his son-in-law, Mr. Howard.

Q. What happened?

A. Nothing happened. Mrs. Howard came out, and me and her shook hands and I hadn't seen her in about several years. There was nobody in the house 'cept Mrs. Howard and the little child.

Q. Did you spend the night?

A. No. I stayed about an hour and a half or an hour—something like that. Mr. Elmore said he would try and let me know if he could locate any timber down there.

Q. Did you leave?

[fol. 174] A. Yes sir.

Q. Mr. Elmore says when you got down there that day he got you to carry him to Lumberton that you had whiskey and you gave him some.

A. That's not true.

Q. Did you have any?

A. No sir.

Q. Did you give him any?

A. Not nary a drop. Not from the time I picked him up at the ditch until I took him home. If he drank any I didn't see him.

Q. The only time you were away from him was when you and Mr. Nye went home to tell your wife?

A. Yes sir.

Q. He says that you gave him a little whiskey when you got home.



A. That's untrue.

Q. You didn't give him any at all?

A. No sir.

Q. Did you go with me to Elmore's home after you had been cited in this matter?

A. Yes sir.

Q. Do you recall who went with us?

A. A patrolman—was his name Causey?

Q. It was a patrolman but his name wasn't Causey. Do you recall who you saw first there?

[fol. 175] A. Saw Mr. Elmore and his daughter Annie.

Q. Do you recall who I thought we were talking to?

A. You was looking for Mr. Henry Elmore, and Henry Elmore answered, and instead of the son it was the old man. And I spoke to you and said, 'You are talking to the wrong man.'

Q. Did he state anything about the whiskey?

A. You asked him was he drunk when he returned home, and he said, 'No, I was not drunk,' and he said he had been drunk, and you said, 'What on?' and he said, 'Whiskey,' and he told you that when I left I gave him one-fourth of a half-pint of whiskey, and he pointed his finger at me and he said, 'You know you brought a bunch of liquor down here.'

Q. Was that when he said you gave him one-fourth of a half-pint of whiskey?

A. Yes sir.

Q. Did you pay him anything?

A. Not one penny in the world.

Q. Offer him anything?

A. No sir.

Q. You had intended talking to him about this matter down there if he had not brought up this matter first himself?

A. Probably I would have mentioned it to him.

Q. Did you have anything to do with getting any of those papers signed?

[fol. 176] A. I don't know a bit more about what was signed than that piece of paper there.

Q. Did you know anything about what Court this matter was in?

A. No sir.

Q. Do you know anything at all about Court procedure?

A. No sir.

Q. Did you know anything at all about what Mr. Nye and Elmore were talking about?

A. No sir.

Q. Know what they were going to do in this lawyer's office?

A. No sir.

Q. When did you find out what had been done?

A. Mr. Elmore said, 'Well, I am through with that suit. It has been worrying me to death and I am through with it now, and it seems like I have unloaded a big burden.'

Q. Did you have any intention of being disrespectful to any Court or any Judge?

A. Not any in the world.

Q. Did you know that Judge Hayes had anything to do with this matter?

A. Not a bit in this world.

Q. Did you know they were going in the Clerk's office at Lumberton?

A. No sir. I was at one place and they were at another.

Q. Whatever you did about this matter was out of pure friendship to Mr. Nye? He had been nice to you?

[fol. 177] A. He had been just as nice to me as any man could be.

Q. Did Mr. Nye give you any whiskey?

A. No sir. Mr. Nye is a man that don't fool with whiskey.

Q. Any at the house?

A. No sir.

Q. Did you see any?

A. No sir.

Q. I believe that man who runs that cafe is a brother of Mr. Nye?

A. Yes sir.

Q. Did you drink anything when you stopped there for supper that night?

A. Nothing but a cup of coffee.

Q. Was Mr. Elmore drinking or drunk when you got down there?

A. No sir.

Cross-examination.

Mr. Guthrie:

Q. You just went on a nice little trip down there to see your old friend about timber and shook hands and that is

all that happened? How many friends do you suppose you shook hands with on the first trip?

A. Not so many.

Q. Well, how many?

A. I shook hands with Mr. Elmore, with Mr. Spivey and—

Q. About how many?

A. Two or three.

[fol. 178] Q. You got down there and you hadn't seen old Henry in a long time. You didn't ask him what the Governor of North Carolina said to the Governor of South Carolina, did you?

A. No sir.

Q. Never took a drink?

A. Not a draught.

Q. And he began to tell you how worried he was about this law suit?

A. Well, I told him by the way Mr. Nye wanted to see him.

Q. And you didn't give him time to tell anybody you were going?

A. We talked about a half-hour and he said it was so late he wouldn't take time to go home.

Q. And you are in the timber business?

A. I was kinder interested in buying some timber.

Q. Mr. Nye runs the oil end of it and you run the timber end of it?

A. No sir.

Q. Where did you pick up that cop when you went down with McNeill?

A. Mr. McNeill picked him up.

Q. Where?

A. Conway, S. C.

Q. You didn't need any patrolman to show you where Mr. Elmore lived.

[fol. 179] A. He didn't have to show me.

Q. He didn't have to show you where he lived but you stopped there in Conway and picked up a cop and took him with you?

A. I think, as well as I remember, this same patrolman that went with Mr. McNeill and went down there, he said a man stopped in Conway and inquired the place where Mr. Elmore lived.

Q. And you had the patrolman on duty watching for somebody, didn't you?

A. No sir, I didn't.

Q. You didn't carry liquor that?

A. No sir.

Q. And how much did you pay that patrolman to go down there?

A. I never paid him nothing. I never asked him to go.

Q. You are Howard Nye's henchman, aren't you?

A. No sir.

Q. Had you ever slept in Howard Nye's house before?

A. No sir.

Q. Where did you spend the night last night?

A. I spent the night last night in the house of Mr. Nye.

Q. You spent the night at Howard Nye's, and you were riding around in Lumberton yesterday following my care, weren't you?

A. No sir.

Q. You saw my car with Durham on the license plates before you saw me with these three men.

[fol. 180] A. We passed around the block and seen it.

Q. What were you talking about yesterday?

A. First one thing and another.

Q. Did you mention this case?

A. I don't know as we did.

Q. How many times did you run around that car while my son and I were in Mr. Hackett's house with Henry in the car?

A. I don't know.

Q. And he said, 'There it is?'

A. He never told me anything about the car.

Q. So you slept in Howard's house last night?

A. Yes sir.

Q. Are you married?

A. Yes sir.

Q. Well, why didn't you sleep at home?

A. I just didn't go home.

Q. Don't you think a man would have to be drunk to sleep with you?

A. I reckon maybe he would.

Q. How long have you been in the employ of Howard Nye?

A. This coming January two years.



Q. You say in last February you were talking to Mr. Nye and he said in a casual conversation something about his daughter marrying into the family? Have you ever taken any BC?

[fol. 181] A. Yes sir. I have taken many a package of it.

Q. And you say the next time you saw him he began to ask you about the habits of James? Did he ask you about yours?

A. Well, he didn't ask me about mine. He knew about mine.

Q. Well, if you had come down there and got this man drunk you wouldn't come up here and tell it would you?

Objection by Mr. McNeill overruled.

A. If I had made him drunk I would have told it.

Q. You went down there with some liquor?

A. No sir.

Q. You left him with a fourth of a half-pint?

A. No sir.

Q. And his son-in-law and all are mistaken about that?

A. Absolutely.

Q. And you never gave him one drop?

A. No sir.

Q. After you had this second conversation with Mr. Nye he then told you he would like to see this suit got rid of?

A. As well as I recollect.

Q. And then you became interested in it?

A. No sir.

Q. Well, Nye was your friend and you wanted to carry out his wishes? You said, 'Howard, I have got some gum timber on your place. I may go down to South Carolina [fol. 182] and I may see the old man.' Did he fill up your car with gasoline to send you down?

A. No sir.

Q. Where did you get the gasoline?

A. At the Lumbee filling station.

Q. Did you pay for the gas?

A. I charged it to myself.

Q. You run an account? Your credit is good?

A. It is good anywheres around Lumberton.

Q. And then you lit out down there to see if you could find some timber?

A. To see if I could locate the timber.

Q. But you went as straight to the old man as you could. You told him, 'Henry, I intend to spend the night with you,' and he said he wanted to get up to Lumberton then?

A. I told him Mr. Nye wanted to see him and he said he wanted to see Mr. Nye.

Q. How far is it from there to Lumberton?

A. I judge it is around 60 or 65 miles.

Q. So when you went to Lumberton with him you carried him right straight to the Nyetown Cafe? Did you give him some supper?

A. Yes sir.

Q. Did you pay for it?

A. Yes sir.

Q. So you paid for his supper?

[fol. 183] A. Yes sir.

Q. Why?

A. I was just paying for it because I liked Mr. Elmore and was trying to accommodate him.

Q. You were helping your friends, weren't you?

A. Yes sir.

Q. After supper where did you go?

A. We went to the Nye oil office.

Q. Had you told Nye you were going to bring him there?

A. No sir.

Q. You took him by surprise when you took him to Howard Nye's office?

A. Yes sir.

Q. When you got up there, who was at Mr. Nye's place?

A. Mr. Barnes, and Mr. Nye, and Mr. Carwell—it was another gentleman there but I can't recall him. He wasn't a stranger, but I just forgot him.

Q. Any lady there?

A. No sir.

Q. What time of day?

A. That was a little after dark.

Q. After office hours?

A. Well, I judge it was around seven-thirty or eight o'clock in April, spring of the year.

Q. Do you know what time his business usually closes?  
[fol. 184] Objection by Mr. McNeill overruled.

Q. Are you familiar enough with it to tell what time he closes his office?

A. No sir.

Q. When you got there, was the office door open?

A. No sir. Mr. Nye came to the door. I told him there was a party out there wanted to see him. He said, 'All right. Tell him I will be through in just a few minutes.'

Q. Did Barnes work for Nye?

A. Yes sir.

Q. Carwell?

A. Yes sir.

Q. And the strange man?

A. Yes sir.

Q. And where was Mr. Elmore when you stepped up to the door?

A. In the car.

Q. Mr. and Mrs. Baldwin came after you got there?

A. We looked and seen a car coming and it was Mr. and Mrs. Baldwin.

Q. The Baldwins drove up after you got there?

A. Yes sir.

Q. Did Elmore get out of the car while they were sitting there?

A. Mr. Elmore got out of the car when I did. Me and [fol. 185] Mr. Elmore were standing outside of my car and Mr. Nye says, 'The boys will be through checking up in just a few minutes,' and about that time this car drove up and we spoke. About that time Mr. Barnes comes out.

Q. Had Mr. Elmore gone into Mr. Nye's office when Mr. and Mrs. Baldwin came?

A. No sir.

Q. How long after that?

A. About five or ten minutes.

Q. Did Mr. Nye invite him to come in?

A. Yes sir.

Q. Express his surprise?

A. Yes sir. Of course, Mr. Barnes come out and shook hands with Mr. Elmore and Mr. Carwell come out, and Mr. Barnes and Mr. Carwell leave, and as soon as we got in there I said, 'Excuse me,' and I went back to the car.

Q. And you cleared the decks for action and left nobody in there but old man Elmore and Nye?

A. Yes sir.

Q. Then what?

A. After they had talked for about five minutes Mr. Nye called me in there.

Q. What did he say?

A. He asked me to take Mr. Elmore home with me, and I told him I would be glad to but we had company. He spoke then and said, 'How about going to spend the night [fol. 186] with your son?' and he said, 'No sir, I don't want to.' And I didn't want to go to the hotel, and he said, 'How about going to my house?' And he said, 'I will go if Mr. Mayers will go.'

Q. Where he and his family were living? Was this the personal home of Howard Nye and his family?

A. Yes sir.

Q. What street?

A. I call it the Fayetteville Highway.

Q. Did Mr. Nye come on with you or did he follow later?

A. I told Mr. Nye I would have to go on home and let my wife know.

By the Court: About how far?

A. About eight miles. Mr. and Mrs. Baldwin was in the office and me and Mr. Nye and Mr. Elmore, and Mr. Nye takes me in his car and runs me out home and we gets back. I goes in the office to tell Mr. Elmore we are ready to go to bed, and he gets in my car and we follow Mr. Nye to his house and he parks his car, and he said, 'I have got to go feed my dogs,' and he said, 'I will meet you down at the Nyetown Cafe in the morning,' and he shows us the bed and all and me and Mr. Elmore goes to bed.

Q. When you were talking with him and you and Mr. Nye went off to tell your wife you wouldn't be home, did you leave Mr. Elmore in the office with Mr. and Mrs. Baldwin [fol. 187] while you went with him?

A. Yes sir. He was in the office with Mr. and Mrs. Baldwin until we got back.

Q. And you took him in charge then?

A. He gets in the car with me.

Q. What becomes of Mr. and Mrs. Baldwin?

A. They stayed there until Mr. Nye came back to the plant.

Q. What is the connection between Mr. and Mrs. Baldwin and Nye?

A. Just good friends.

Q. No business relations?

A. I think so.



Q. What is the relation between them?

A. Well, I really am not able to tell you.

Q. Does she work for Mr. Nye?

A. No sir.

Q. Does he?

A. I think he is manager of a little oil plant down there.

Q. When did you go home did Howard Nye go in the house with you?

A. Yes sir.

Q. Well, where did you go then? What floor?

A. First floor.

Q. Did you have the spare room? Big bed in there, wasn't it?

A. Yes sir.

[fol. 188] Q. Bath in there?

A. Yes sir.

Q. Then you and Henry stripped off and went to bed. Did he sleep well?

A. As far as I know.

Q. What time did you get up?

A. I guess it was around six-thirty, or seven o'clock.

Q. Where was Nye?

A. He went back to the plant.

Q. Went back to the plant?

A. Well, I guess he had gone around there.

Q. Did he come in the room when he got back?

A. He just come and peeped in the room.

Q. And you had not gone to sleep?

A. No sir.

Q. Whose cafe did you eat breakfast in?

A. Nyetown.

Q. Who paid for the meal down there that morning?

A. Mr. Nye.

Q. And he paid for the supper?

A. I paid for the supper myself.

Q. Where did you get the money?

A. I had it.

Q. You say you are not interested in dismissing this suit in Durham. Why were you spending your money on Elmore?

[fol. 189] A. I just felt like he was hungry.

Q. Well, now after you had breakfast, where did you go?

A. After breakfast I gets in my car and goes to the motor company and garage.

Q. And Henry?

A. He and Mr. Nye gets in Mr. Nye's car.

Q. Did Nye eat with you?

A. No sir. We had et breakfast.

Q. And when they came back and met you at the garage then it was you asked Nye to slip you \$10.00 to pay for your car?

A. He didn't slip it to me.

Q. And you paid \$10.00 to repair that car?

A. I think it cost around six or seven dollars.

Q. Did you ever give him the money back?

A. When I sold the tobacco.

Q. You don't know what happened when they went off?

A. No sir. Next time I seen them they both came back in Nye's car.

Q. And then Nye turned him over to you?

A. Told me to take him home.

Q. And filled your car with gas?

A. No sir.

Q. Where did you get the gas?

A. I got it from the man that operated the Lumbee service station.

[fol 190] By the Court: Did you pay for it, or did Mr. Nye?

A. I paid for it myself. I pay my gas on my grocery bill.

Q. You bought ten gallons of gas?

A. Yes sir.

Q. Did that fill the tank?

A. I think it did.

By the Court: Mr. Mayers, before the day you went after old man Elmore had you ever had any business relations with the old man?

A. Nothing but we had always been friends.

By the Court: Any special friendship?

A. Only he was just a good customer.

By the Court: And that was some six or seven years before that?

A. Yes sir.

By the Court: You say you went to see about some timber. From your home near Lumberton?

A. Yes sir.

Q. And you say it is 60 or 65 miles from Lumberton to his home?

A. Yes sir.

Q. Now then, you went down there and he didn't know anything about any gum timber. He said he hadn't found any?

A. No sir.

[fol. 191] Q. If I understand you correctly, you brought him back to Lumberton at his request?

A. Yes sir, absolutely.

Q. And not because of anything Mr. Nye had said?

A. No sir.

Q. No liquor?

A. No sir.

Q. No money?

A. No sir.

Q. No threat?

A. No sir.

Q. But you brought him back simply because he ~~was~~ ~~you~~ ~~to~~ you to?

A. Yes sir. When I took him back next day, he said, 'Mr. Mayers, if I ever get able I will pay you for this trip.' And I said, 'I don't charge you a thing in this world.'

By the Court: He had already told you Mr. Nye wanted him to drop it?

A. Yes sir. Said he was through with it.

Q. When you brought him back to Nye you didn't let Mr. Nye know that Mr. Elmore wanted to drop the case?

A. No sir.

By the Court: Why did you take him back the next day?

A. I promised to take him back that night and it turned out that I couldn't get back. I had to get him back next morning.

[fol. 192] Q. What time did you leave Lumberton?

A. I judge right around ten o'clock.

Q. And how long did it take you?

A. About two hours driving.

By the Court: Four hours down there and back?

A. Yes sir.

Q. And you never did get any pay for taking him back?

A. No sir.

(Recess from Six o'clock until Seven o'clock.)

[fol. 193] MR. TILLMAN HARDY, witness for the respondents, having been duly sworn, testified:

Direct examination.

Mr. McNeill:

Q. What are your initials?

A. Tillman Hardy.

Q. Mr. Hardy, where do you live?

A. I live five miles east of Loris.

Q. Were you living there the 19th of April of this year?

A. Yes, sir.

Q. Do you know Mr. Mayers?

A. Yes sir.

Q. Did you see him then?

A. Yes, I seen him sometime, but I don't know just what date.

Q. One or two days?

A. One day and the next day following. He was inquiring for a fellow named Elmore. Spivey called me out and said there is a man looking for Elmore.

Q. Did he leave?

A. Yes, sir.

Q. Did you see him next day?

A. Yes sir. I think about twelve o'clock.

Q. Where?

A. Same place.

Q. Anyone with him?

A. Mr. Elmore.

[fol. 194] Q. What were they doing when you saw them?

A. They were drinking a Pepsi-Cola.

Q. Where?

A. At this filling station.

Q. Did you hear any conversation take place there?



A. I heard them talking something or other and I paid mighty little attention to it. I heard something or other about a man paying him \$50.00.

Q. Did you talk to Mr. Elmore?

A. I spoke to him.

Q. Where was he?

A. In the front seat.

Q. How close did you get to him?

A. Right to the car where he was sitting.

Q. State whether or not Mr. Mayers was drinking or under the influence of whiskey?

A. If he was, I didn't catch on to it.

Q. Mr. Elmore?

A. If he was drinking I couldn't catch it.

Q. See any liquor?

A. Not a drop.

#### Cross-examination.

Mr. Guthrie:

Q. What did you say your name was?

A. Hardy.

Q. Whose store were you at?

A. M. H. Spivey's.

[fol. 195] Q. You have been on a chain gang down in South Carolina?

A. Yes, sir.

Q. How long did you serve?

A. Six months. That ain't concerned in this Court.

Q. What did you go for?

A. That don't concern this Court.

By the Court: Since you are a witness, it does.

Q. What were you convicted of?

A. For being accused of slander.

Q. Slandering who?

A. Mr. Spivey's daughter.

Q. Why did you come up here?

A. I come up here of my own free will.

Q. Who asked you?

A. Mr. Mayers was out to my home the other night and asked me if I had seen him before and I told him 'Yes' and he wanted to know where and I told him the truth and that was all.

Q. When was he at your place?

A. One night.

Q. Do you know Howard Nye?

A. No sir; I don't.

Q. Was there anybody else with him?

A. Yes.

Q. What did he say to you?

A. He didn't open his mouth.

[fol. 196] Q. What time was this?

A. They called me up. I had been asleep.

Q. What time?

A. Well, I didn't look at the clock. I imagine it was about ten o'clock.

Q. Have you a phone?

A. No.

Q. You mean they knocked on the door.

A. Yes, sir.

Q. What kind of looking man was with him?

A. He was just an ordinary man. You know I ain't got but one eye to see with and I can't see very well in the dark.

Q. White or black.

A. White.

Q. How tall?

A. He was sitting in the car.

Q. Where was the car?

A. They drove up in the yard.

Q. And you saw this man here, Mr. Mayers, and another you had never seen before. Have you been around here all day?

A. No sir, not all day.

Q. Have you seen him in this court room?

A. I think I have.

(Mr. Carwell stands up.)

A. That's the man.

Q. How did you come up?

[fol. 197] A. With the patrolman.

Q. South Carolina patrolman?

A. North Carolina patrolman.

Q. What patrolman went down there after you?

A. Didn't no patrolman come down there after me. I came up here with a patrolman.

By the Court: Where did you get with him?

A. I got with him at Lumberton.

Q. Sergeant Bell—is he the gentleman?

A. I don't know him by name.

Q. Did you ride up here in a State automobile?

A. I reckon it was.

Q. What color was it?

A. I couldn't even tell you that.

Q. Have a radio in it?

A. Yes sir.

Q. Did he have on a uniform?

A. Yes sir.

Q. Where did you meet him? Who introduced him to you?

A. I haven't been introduced.

Q. How did you get in touch with this patrolman?

A. I just happened to get on his car and told him I didn't have no way to get up here.

By the Court: Did you make any arrangements about anybody picking you up?

A. He just drove up to the filling station and he stopped.  
[fol. 198] By the Court: How did you happen to connect up with him?

A. I was at the filling station.

By the Court: Had anybody asked you to come?

A. No sir.

By the Court: Anybody at all?

A. This man here (pointing at Mayers) this man said if I could recognize him he would be glad if I come.

By the Court: Did he tell you how you could get up here? There is nothing wrong with it. How did you happen to get a way up here?

A. I just met him there at the filling station and come with him.

By the Court: How did you find out how to get up here?

A. I just happened to be out at this filling station.

By the Court: How did he know you wanted to come?

A. I told him.

Q. You ate breakfast with Mr. Nye this morning? Ate at Nyetown?

A. I paid for it.

Q. Weren't you at home yesterday—yesterday was Sun-

day—wasn't this man down to your home last night and brought you to Lumberton to meet the patrolman?

A. No.

Q. How did you get to Lumberton?

A. I came with him in the daytime.

Q. He left you at Nye's filling station, then this patrol-[fol. 199] man that you happened to accidentally find picked you up?

A. Yes.

Q. Did he agree to take you back?

A. No agreement.

Q. Did he pay you anything?

A. Not a cent.

Q. Who paid for your dinner today?

A. Paid for it myself.

Q. Anybody give you any money today?

A. Nobody give me none.

Q. When did you meet this gentleman sitting there behind Judge Varser? (Pointing at Nye)

A. The first I ever seen that man was last night.

Q. Where?

A. Out at his brother's filling station.

Q. Who was with him?

A. I think he was by hisself.

Q. What time?

A. Just after dark.

Q. He came up to the filling station while you were there?

A. Yes.

Q. You had a talk with him?

A. Yes. I did talk to him.

Q. What did you talk about?

A. Nothing concerning this.

Q. Did you tell him you were on your way to Durham?  
[fol. 200] A. Never mentioned it.

Q. What did you talk to him about?

A. That's my business.

Q. He was a stranger with you?

A. Yes sir.

Q. And still you were talking so privately that it was your own business. How long did you talk to him?

A. That's my business.



Re-direct examination.

Mr. McNeill:

Q. I understand that Mr. Mayers went down to your home and got you and brought you to Lumberton yesterday?

A. No. I got on with him at the filling station at Daisy.

Q. That is where you met him?

A. That's right.

Q. And then he brought you to Lumberton on Sunday?

A. That's right.

Q. And the State policeman brought you here?

A. Yes sir.

Q. Did he bring anyone else?

A. Yes.

Q. Who?

A. Fellow Harris.

Q. Did he bring Mr. Kinlaw too?

A. I don't know. He brought another man.

[fol. 201] Re-cross examination.

Mr. Guthrie:

Q. Do you see this gentleman sitting right there? (Pointing to C. T. Council, Jr.) Have you talked with either of those gentlemen? (Also pointing to C. T. Council, Sr.)

A. No sir.

[fol. 202] MR. HARRIS, witness for the respondents, having been duly sworn, testified:

Direct examination.

Mr. McNeill:

Q. Did you ever live in Lumberton?

A. On this side, fourteen miles, St. Pauls.

Q. Did you ever know Mr. Mayers?

A. Yes sir.

Q. Where?

A. Lumberton.

Q. You are living in South Carolina at this time?

A. Yes sir.

Q. Were you living there in April of this year?

A. No sir.

Q. Were you down there in April this year?

A. Yes sir. Right this side of the store, Spivey's.

Q. Did you see Mr. Mayers here down there at that store anytime during April this year?

A. Yes sir.

Q. How was he traveling?

A. I never paid any attention to it.

Q. Where was he?

A. Standing at the store talking to Mr. Spivey.

Q. Did you hear any of the conversation?

A. Yes sir.

Q. What part?

A. I come up here and he was talking to Mr. Spivey about [fol. 203] *about* farms and I shook Mr. Mayer's hand when I saw him and I stood there until he stopped talking to Mr. Spivey about renting farms, and Mr. Spivey says to him, 'I would rather sell you a farm than rent you one. I have got five or six.

Q. Did you leave before he did?

A. Yes sir.

Q. How close were you to him?

A. I shook his hand.

Q. State whether or not you noticed any odor of intoxicating liquor on him?

A. Not a bit.

Q. He appeared to you to be sober?

A. Perfectly.

Q. I believe you said you left then and didn't remain any longer?

A. Yes sir.

#### Cross-examination.

Mr. Guthrie:

Q. How far is St. Pauls from Lumberton?

A. Fourteen miles.

Q. And you now live near Mr. Spivey's store?

A. Yes sir.

Q. What business are you in?

A. I went down there to farm, but I'm not able to work.

Q. Do you know Howard Nye?

A. Not 'til last night.

[fol. 204] Q. Where did you meet him?

A. Filling station.

Q. You ate supper at the station? Who paid for it?

A. I don't know. Mr. Nye I think.

Q. Who introduced you?

A. Mr. Mayers.

Q. You came up with the North Carolina patrolman?

A. Yes sir.

Q. State car?

A. I think so.

Q. By the way, Mr. Mayers brought you up as far as Lumberton? Who came up there with him?

A. Mr. Carwell.

Q. Mr. Mayers and Mr. Carwell brought you as far as Lumberton. Where did you spend the night?

A. Mr. Hardy's aunt.

Q. Who paid for your lunch here today?

A. I don't know who paid for it. I will be fair with you.

Q. So you came up here without any cost at all to you.

How are you going back?

A. Same way I came, I reckon.

Q. Is that the man? This State Highway Patrolman?

A. Yes sir.

Q. When did you meet up with him?

A. This morning.

Q. Who introduced you to that man there? (Point- at Sergeant Bell)

[fol. 205] A. I knew him for ten years.

Q. And you accidentally met him at Nye's?

A. Yes, I met him at the filling station.

Q. Did he tell you he had been sent down there to bring you?

A. No sir.

Q. How did he know?

A. Mr. Nye, Howard Nye's brother.

Q. He told the patrolman to bring you up here?

A. Yes sir.

Q. How much was paid you?

A. Not a penny.

Q. Have you known Mr. Howard Nye's brother over there? (Pointing at Eugene Nye)

A. No sir.

Q. Do you know his first name?

A. No sir.

Q. Have you talked to Mr. Howard Nye?

A. Just only speaking.

Q. You have talked to his brother, the one you ate supper with?

A. Yes sir.

Q. Have you discussed what you were going to testify?

A. No sir.

Q. Talked to nobody since you got here except Mr. McNeill?

A. No sir.

[fol. 206] Q. You just went up to Mr. McNeill and told him you were a witness and what?

A. Yes sir. I was down there the day they were through and it come to me, and I asked him, 'Mr. Mayers, was that on the 19th?' and he said it was and I said I could come.

Q. You rode up with this gentleman over here and you didn't discuss this case at all?

A. No sir.

Q. But Mr. Nye's brother told you you would be brought up here?

A. I didn't know how we were coming until he drove up.

Q. And he is going to take you back?

A. Yes sir.

Q. North Carolina car, North Carolina patrolman?

A. Yes sir.

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[fol. 207] MR. E. G. BALDWIN, witness for the respondents, having been duly sworn, testified:

Direct examination.

Judge Varser:

Q. What is your name?

A. Baldwin.

Q. What are your initials?

A. E. G.

Q. Do you know Mr. Howard Nye?

A. Yes sir.

Q. Know where his place of business is?

A. Yes sir.

Q. Were you there on the night of the 18th of April this year?

A. Somewhere around that time.



Q. Who was there with you?

A. My wife.

Q. Did you see Mr. Mayers and Mr. Elmore that night?

A. Yes sir.

Q. Where?

A. Mr. Nye's office.

Q. Did they come before or after you did?

A. I think they were parked there when we drove up.

Q. Did you talk with either of them?

A. I talked to Mr. Elmore a little while and spoke a few words to Mr. Mayers.

[fol. 208] Q. How close were you?

A. Well, Mayers walked up to my car and leaned his hands on the door.

By the Court: How long were you with Mr. Elmore?

A. Fifteen or twenty-five minutes.

Q. Mr. Nye had left?

A. Yes sir.

Q. Do you know where?

A. He was going to Mr. Mayers' home to tell his wife.

Q. Were these gentlemen under the influence of liquor that night or drinking that you could tell?

A. I didn't see any intoxicants and they seemed to be sober.

Q. Seemed to be in normal condition?

A. Yes sir.

Cross-examination.

Mr. Guthrie:

Q. I believe you are engaged in business with Mr. Nye?

A. I operate a plant at Tabor City.

Q. Did then and do now?

A. Yes sir.

Q. How did you happen to be there?

A. Mr. Nye called me up the day before and he told me he would like for me to come over and look at the trucks.

Q. It was just a coincidence?

A. Yes sir.

Q. What day was that?

[fol. 209] A. I don't remember.

Q. What day of the week?

A. I don't remember the day.

Q. Do you know what month it was or what year?

A. Yes sir. It was around about the 20th of April or sometime about that time.

Q. When Mr. Nye went off with Mayers to tell his wife you were left there with Mr. Elmore?

A. Yes sir.

Q. You knew he had gone off to carry Mayers home, and they left you on guard with old man Elmore. Did he say anything to old man Elmore about going off while he was gone?

A. He just excused himself.

Q. What did he say to Elmore? Did he ask you to stay there?

A. Yes sir.

Q. He left you there and told you to stay there until he got back with the old man. Did he tell you to lock the door?

A. No sir.

Q. Not to let him get away?

A. No sir.

Q. When Mr. Mayers returned, then he discharged you and your wife?

A. No sir. He excused himself again and said, 'I will [fol. 210] meet you at the cafe.'

By the Court: Did he come back to the filling station or did he meet you at the cafe?

A. He met me at the cafe.

By the Court: You didn't stay at the filling station while he was gone?

Mr. McNeill: Your Honor, Mr. Nye left twice. He left once to take Mr. Mayers home and he left again to take Mr. Elmore and Mr. Mayers to his house.

Q. Well, so far as you know, Mr. Elmore was completely under guard, and you never left him until Mayers took charge?

A. Naturally the office doors were all open.

Q. Did Nye, when he came back, ask you what old man Elmore said? What did you talk about when you met him again?

A. We dropped in there at the cafe and got a cup of coffee and he said there was the truck.

Q. Never mentioned the suit?

A. No sir. It never crossed my mind.

Q. When did you first find out about it?

A. Yesterday.

Q. Do you mean you came all the way up here and didn't know what you were coming for yesterday?

A. I didn't come yesterday.

Q. When did you come?

A. Today.

[fol. 211] Q. You drove all the way over and didn't know?

A. Yes I knew yesterday.

Q. Who told you?

A. Mr. Nye called me yesterday about one-thirty and asked me what I was doing, and asked me how about riding over to Lambertton, and said, 'You haven't been there in a long time.' So I rode over there and it was the first time I had ever thought about Mr. Elmore since that night.

Q. You just casually rode over?

A. Yes sir.

Q. And you didn't know what he wanted. What did he ask you about?

A. He said he just happened to think I was there, and he just wondered if I remembered.

Q. And, of course, he asked you if Mr. Elmore was drunk?

A. He asked me about it, and I told him I recalled it.

By the Court: What was said now?

A. He asked me if I remembered, and I told him what happened, and he said, 'That is fine, I just happened to think about it, and wanted to see if you remembered it.'

Q. He told you he was in trouble?

A. No sir.

Q. Cited for contempt?

A. No sir.

Q. What interest did he tell you he had in it?

[fol. 212] A. In other words, just a witness that this man was sober.

Q. What interest has Nye in this suit?

A. I don't know.

Q. He didn't tell you that Mr. Elmore was suing the BC Company?

A. I don't believe he told me he sued the BC Company.

Q. How did you get up?

A. I rode up in the car with him.



Q. When did you hit town?

A. About nine-thirty this morning.

Q. Ate lunch with Mr. Nye?

A. Yes sir.

Q. He paid the dinner check? Didn't cost you a cent?

A. No sir.

Q. Did he pay you for a day's work for coming up here?

A. I haven't heard anything about it. I don't know whether he is going to take that out of my salary check or not.

Q. Is your business closed up right now?

A. Yes sir.

Q. You left your business and came up here?

A. Yes sir, that is, his business. I am running his business in Tabor City.

Q. How are you paid?

By the Court: You said something about a salary, does he pay you a salary to work there?

A. Yes sir.

[fol. 213] Q. Doesn't depend on how much gas you sell?

A. No sir.

Q. You get your wages, of course, whether the plant is closed up or not? What does he do when you are not at work?

A. I have been there.

Q. Who was in the car with you? Mrs. Baldwin and Mr. Nye?

A. And just a colored boy that works for me.

Q. A colored boy drove you up?

A. No, he didn't drive. He just works around the house.

Q. He came along?

A. Yes.

Q. Only four in that car?

A. Yes sir.

[fol. 214] MRS. E. G. BALDWIN, witness for the respondents, having been duly sworn, testified:

Direct examination.

Mr. McNeill:

Q. Do you recall having been with your husband on that night?

A. Yes sir.



Q. Did you see Mr. Elmore?

A. Yes.

Q. Did you see Mr. Mayers?

A. Yes sir.

Q. Did Mr. Mayers and Mr. Nye leave Mr. Elmore there with you?

A. Yes sir.

Q. How long?

A. About twenty minutes.

Q. Did you talk to Mr. Elmore?

A. We had a very nice conversation. He was sitting on one side of the desk and I was on the other side.

Q. Did he appear to be in a normal condition?

A. Yes sir.

Q. Drinking?

A. No sir.

Q. Was Mr. Mayers drinking?

A. No sir.

Q. When Mr. Mayers came back, what happened?

A. They went off.

[fol. 215] Q. You went with them?

A. I don't know. This gentleman here—, those two—went in the car together and Mr. Nye went alone.

Q. Did you see Mr. Nye again?

A. Yes. Met him in a Cafe.

#### Cross-examination.

Mr. Guthrie:

Q. After Mr. Elmore went off with Mr. Nye and Mayers you went to what Cafe?

A. Central Cafe.

Q. And then you had dinner?

A. No, no, we just had a cup of coffee.

Q. Had you ever seen Mr. Elmore prior to that time?

A. No sir.

Q. Well, why do you tell Mr. McNeill he was in a normal condition?

A. Well, I was left in the office with him.

Q. Well, you testified when Mr. McNeill asked you that he was in a normal condition?

A. I mean that he was not drinking.

Q. Did you see him today?

A. Yes, I saw him.

Q. Would you call him normal today?

A. I think he was not drinking.

Q. How does his condition compare?

Objection by Mr. McNeill overruled.

Q. Now as compared with his condition as you saw him today how would his condition compare with his condition [fol. 216] mentally and physically, as you saw him that night?

A. Well, all that I can tell you, he was not drinking.

By the Court: Mr. Guthrie is asking you to compare his appearance today.

A. Just about the same.

Q. They have these breath killers today?

A. Yes sir.

Q. You emphasized particularly that you did not smell any whiskey on him. Do you sell these breath killing things at your filling station?

A. No sir.

Q. And you say he was not drinking?

A. Yes sir. I live in a town where there is plenty of whiskey and you cannot fool me when a man is drinking.

Cross-examination.

Judge Varser:

Q. Do you remember what was first said when you came over to Lumberton yesterday?

A. Well, I had not been there since last April, since that night that was about the 20th, and when I went there yesterday I said to Mr. Nye, "I haven't been here in a year," and he said, "not that long," and I said, "I wouldn't forget the time that gentleman, Mr. Elmore, was here and we stayed here that night with him on account of the dog. His dog did not like it so that is the reason I remember it."

Q. What did Nye say?

A. Well, he said, "that is the very thing I like for you [fol. 217] to say." He said, "I just as well break it right now." He told me how it was and all and asked me did I remember it and I told him he was sober.

Recross-examination.

Mr. Guthrie:

Q. May as well break the news?

A. Yes sir.

Q. And when he broke the news, what news?

A. Well, he knew I was there and when that fellow, Mr. Elmore, was there.

Q. What news?

A. Well, he wanted me up here because he was in this trouble.

Q. He told you he was in trouble in Durham?

A. Yes sir.

Q. And the news was that he was in trouble?

A. Yes sir, and he wanted to know was the man drunk.

Q. You mean you can look at a man in this crowd and tell whether or not he is drunk—you can look at a stranger you never saw before and you can tell, you have had so much experience with drunk people, you can look at him and tell whether he was drunk or not.

A. Well, I can by conversation.

Q. I won't argue with a woman.

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[fol. 218] Mr. BARNES, witness for the respondents, having been duly sworn, testified:

Direct examination.

Mr. McNeill:

Q. Do you work for Mr. Nye?

A. Yes sir.

Q. Were you working for him in April?

A. Yes sir.

Q. Do you re-call having been there the night Mr. Elmore and Mr. Mayers came there?

A. Yes sir.

Q. What time was it?

A. After dark.

Q. Did you talk with him then?

A. Yes sir.

Q. Which one?

A. I spoke to Mr. Mayers and spoke to Mr. Elmore.

Q. Is that all you said?

A. Well, I come on out of the office and shook hands with Mr. Elmore and asked him where he was staying and he said in South Carolina and I said, 'are you coming back' and he said, 'he wasn't coming back—he just came up to see Mr. Nye, just a little trip, and about that time Mr. Carwell came and said, 'I will take you boys home'.

Q. What boys?

A. Me, and Bullock, and——

Q. Were either one of them drinking?

[fol. 219] A. Not a bit, that I could tell.

Q. How close did you get to them?

A. Right close.

Q. Did you know the business of Mr. Elmore and Mr. Nye?

A. Didn't know a thing about it.

• Cross-examination.

Mr. Guthrie:

Q. Mr. Barnes, the whole force was on duty at Nye's office at that vital time, either by coincidence or appointment?

A. The bookkeeper was not in.

Q. Everybody else?

A. I think so.

Q. Including Mr. Nye's operator down at Tabor City?

A. I think Mr. Baldwin come up.

Q. He was there?

A. Yes sir.

Q. How many employees were in that office by coincidence at the time Mr. Elmore and Mayers happened to arrive? Howard Nye?

A. Yes sir.

Q. Mr. and Mrs. Baldwin?

A. No sir.

Q. They came up later?

A. Yes sir.

Q. Was Mr. Carwell there?

A. Yes sir.

Q. Who else?

A. Mr. Bullock.

[fol. 220] Q. That's four? What time of day was it?

A. After dark, I don't know.



Q. Was it pay day? Waht day of the week was it?

A. Don't know.

Q. Mr. Howard Nye had not told you he was expecting company?

A. No sir.

Q. Was it unusual?

A. Well, we are all there until we get through work and get through checking up.

Q. It was then unusual?

A. No, we got off early to what we do sometimes.

Qu. What time do you get through?

A. Six or seven o'clock.

Q. And stay how late?

A. Until we get through.

Q. When do you get through?

A. Sometime five o'clock in the evening and sometimes ten o'clock in the evenings.

Q. Seven o'clock this night?

A. I do not know whether it was seven or eight o'clock.

Q. When did you find out Mr. Nye was in trouble?

A. This morning.

Q. Did he break the news to you this morning?

A. The only thing he asked me this morning was, 'do you remember Mr. Elmore and Mr. Mayers that night' and I said, 'yes sir', and he said, 'did you talk to them', and I said 'yes sir'. He said, 'good, I want you to go to Durham'.

[fol. 221] Q. The whole force is here?

A. No sir.

Q. Who's left?

A. The truck drivers.

Q. Well, who in the crowd was left in the office?

A. The bookkeeper and truck drivers.

Q. They brought the whole force up here accept the truck drivers?

A. No sir.

Q. Who is left?

A. Fellow named McNeill.

What does he do?

A. Truck driver.

Q. So he broke up the whole force, and every one is a witness that Mr. Elmore was sober?

A. Absolutely.

- Q. You do not know what happened that night?  
 A. I didn't see him any more.  
 Q. Now when you left him there, did you all go out at one time?  
 A. Three of us.  
 Q. All went out together?  
 A. Yes sir.  
 Q. Who had charge of the old man when you left?  
 A. He was standing outside.  
 Q. Mayers on duty?  
 A. Yes sir.  
 Q. Where was Mr. Nye?  
 [fol. 222] A. Mr. Nye was in the office.  
 Q. Of course, Mr. Howard Nye brought you up?  
 A. I paid my own expenses. I came up with Mr. Carwell.  
 Q. You didn't pay for the gas?  
 A. No sir.

Cross-examination.

Judge Varser:

- Q. What is your business?  
 A. Truck driver.  
 Q. Do you come in each day and check up?  
 A. Yes sir.  
 Q. And that is what you were doing that night?  
 A. Yes sir, and when we got finished I came on out and spoke a few words to Mr. Elmore and Mr. Mayers, too, and I went on and got in the car with Mr. Carwell.  
 Q. Checking up is a report on how much gasoline?  
 A. —

Recross-examination.

Mr. Guthrie:

- Q. How many truck drivers are left at home?  
 A. One.  
 Q. Well, you have got all of the truck drivers up here, except one?  
 A. Four.  
 Q. Your truck is idle?  
 A. I guess mine is.

[fol. 223] G. V. JENNINGS, witness for the respondents, having been duly sworn, testified:

Direct examination.

Mr. McNeill:

Q. Mr. Jennings, were you living in Lumberton in April of this year?

A. Yes sir.

Q. How long have you lived there?

A. Sixteen years.

Q. What is your business?

A. Running a service station. The Lumbee service station.

Q. Do you know W. H. Elmore?

A. Yes sir.

Q. How long have you known him?

A. I reckon I have been knowing him for ten years.

Q. What do you sell Mr. Mayers?

A. Groceries, gas and oil.

Q. Did you see Mr. Elmore on the 19th day of April?

A. It was about that time.

Q. Who was with him?

A. Mr. Mayers.

Q. Where?

A. At the station.

Q. How?

A. They drove up in a car.

Q. What happened?

A. They drove up and I went out there to wait on him and [fol. 224] I had not seen Mr. Elmore in a long time and I asked him where he was staying, and asked Mr. Mayers what he wanted, and he got some gas and oil.

Q. Which way did they go?

A. Vermont road.

Q. What was the condition of Elmore?

A. He looked like he always did.

Q. He was not a drunk man?

A. No sir.

Q. How close did you get?

A. I was standing at the car door.

Q. Did he talk normal?

A. Yes sir.

Q. Was Mr. Mayers drinking?

A. No sir.

Q. About what time of day was that?

A. Somewhere between ten and eleven o'clock.

Cross-examination.

Mr. Guthrie:

Q. Did you walk up and smell his breath?

A. No sir.

Q. Mr. Mayers get out?

A. Yes sir.

Q. Did Mr. Elmore get out?

A. No sir.

Q. You didn't know whether he could walk straight or not?

A. No sir.

[fol. 225] Q. Well, Lonnie is the man who bought the gas?

A. Yes sir.

Q. Did he pay?

A. No sir, he charged.

Q. You are a lessee of Nye?

A. Absolutely.

Q. And Nye furnished gas to go in your station?

A. Yes sir.

Q. And you pay him on a gallon basis?

A. Yes sir.

Q. And you were on the side of the filling station. Did you walk out to the gas tank?

A. Yes sir.

Q. You walked clean around the tank and old man Elmore was sitting on the other side?

A. Yes sir.

Q. Did you talk to him?

A. Yes, I talked to Mr. Elmore.

Q. Well, you have seen a lot of drunks that talked fairly normal?

A. Yes sir.

Q. Do you see a good many drunks where you work?

A. Used to.

Q. Lonnie doesn't drink?

A. No sir.

Q. You don't drink?

[fol. 226] A. No sir.



Q. And you don't sell any?

A. I sell beer.

Q. Did Lonnie get a bottle of beer?

A. No sir. He didn't go in the store.

Q. Which way did they go?

A. They headed towards Conway.

Q. You never saw Elmore the day before?

A. No sir.

Q. Know where he slept?

A. No sir.

Q. All you know is enroute to South Carolina Lonnie stopped the car and bought some gas?

A. Yes sir.

Q. Who brought you up here?

A. I came up here on my own car. With Mr. Carwell.

Q. On Nye's gas?

A. No sir.

Q. Who got it?

A. I couldn't tell you. I might have had enough gas in the tank.

By the Court: Did Mr. Mayers pay you for the gas that he charged?

A. Yes sir.

By the Court: Mr. Nye didn't pay you?

A. No sir.

[fol. 227] Cross-examination.

Judge Varser:

Q. Did you mention this to Mr. Nye or did he mention it to you first?

A. I mentioned it to Mr. Nye.

Q. What did you say?

A. I never said nothing to him for about three or four days, and one day he was out at the station and I said, 'Mr. Nye I see they are getting you in a little hot water, and he was a funny drunk if he was drunk.

Q. You saw it in the paper?

A. Yes sir.

Recross-examination.

Mr. Guthrie:

Q. And you volunteered to come up here as a witness?

A. Yes sir.

[fol. 228] EUGENE NYE, witness for the respondents, having been duly sworn, testified:

Direct examination.

Mr. McNeill:

Q. Mr. Nye, you are a brother of R. H. Nye?

A. Yes sir.

Q. And you run a cafe and filling station called Nye-town?

A. Yes sir.

Q. Do you know Mr. Mayers here?

A. Yes sir.

Q. Know Mr. Elmore?

A. Never saw him but two times until today.

Q. When was the first time?

A. Late about supper time they came in, and Mayers asked me about a telephone and I said, 'I haven't got a telephone. Mr. Crawford has got a telephone.' And he looked about and said, 'How about supper?'

Q. Who came in?

A. Mr. Elmore and Mr. Mayers.

Q. Were they drinking?

A. No sir.

Q. Did they eat there?

A. Yes sir.

Q. Who paid?

A. I don't know. They might have paid my wife.

Q. Did you see him any more?

A. Yes sir. In my place next morning about seven o'clock.

[fol. 229] Q. What were they doing?

A. Came in to breakfast.

Q. While they were there who came in there that they knew?

A. My brother came in. They looked like working and I went on back in there. They et h-arty both times. Mr. Elmore had pork and vegetables for supper and this gentleman had beef.

Q. How did they leave your place?

A. I don't know.

Q. You don't remember?

A. It was after my brother came in.

Q. Were either of them drunk?

A. No sir.

Q. Could you tell?

A. Yes sir.

### Cross-examination.

Mr. Guthrie:

Q. They ate like a couple of gentlemen whose appetities had been whetted up with liquor?

A. They ate h-arty.

Q. How h-arty?

A. They just ate h-arty.

Q. You don't drink?

A. No sir.

Q. Who was the gentleman you beat up down there and put in the hospital?

A. Wait—— (Standing up) I have been wanting to see you.

[fol. 230] By the Court: Finish your question.

Q. Who did you say it was?

A. Frank McNeill.

Q. I ask you, didn't you snatch him out of his car in front of your filling station when he was riding along tending to his own business, and you told him——

A. Mr. McNeill came into my filling station and ordered a pack of cigarettes and would not pay for them \* \* \* I came up and I said, 'What is the matter?' and he said, 'What the H—l!' and I said, 'I own the place,' and he said, 'The h—l you do,' and I said, 'Yes sir,' and I said, 'What is the matter?' \* \* \* I backed up in the corner \* \* \* he run his hand in his pocket, and when he did, I grabbed his hand, and then I hit him with my fist, and then I caught him by the collar \* \* \* (Mr. Nye describes his fight in great detail with illustrations) And then later he was arrested. I never had him arrested. And he got out. I hit him in my station with my fist twice. When I hit him this way and his hand started up I pounded him with my fist and when his hand come out of his pocket I never hit him no more, and he still owes me for the cigarettes!

Q. And he won't pay you?

A. He ain't mad at me. That son of a you-know-what——

Q. Did you put him in the hospital?

A. No sir.

[fol. 231] Q. I ask you didn't you put him in the hospital for seven weeks?

A. No sir. The police took him home and he stayed in the house for three or four days, the way I understand it.

Q. I aske you if a bill wasn't presented against you?

A. It went to a Grand Jury and the paper came out that on the information and belief that Sergeant Bell arrested Mr. McNeill—and I had no more to do with this than you did—and the Jury throwed it out (Was unable to get correct ans.).

Q. The Grand Jury?

A. No. The little court down there—the little six jury court.

Q. It never got to the little six jury court did it?

A. Well, the Judge——

Q. I ask you, haven't you and your brother, Mr. Howard Nye the reputation of being court-fixers?

Objection by Judge Varser sustained.

Q. Are you in business with your brother?

A. No sir.

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[fol. 232] F. R. BELL, witness for respondents, having been duly sworn, testified:

Direct examination.

Judge Varser:

Q. What are your initials, Mr. Bell?

A. F. R.

Q. How long have you been in the highway patrol?

A. 11 years.

Q. How long were you stationed at Lumberton?

A. 9 years.

Q. Did you see Mr. Howard Nye and this gentleman here, Mr. W. H. Elmore, on or about the 19th of April, anywhere between the — furniture store and Johnson & Floyd office and the Court house?

A. Yes sir.



Q. Tell what you observed as to whether or not he was drunk?

A. He was not.

Q. How close were you to him?

A. About 5 steps I reckon.

Q. Did you know Mr. Elmore prior to that date?

A. Yes sir.

Q. And, of course, you know Mr. Nye?

A. Yes sir.

Q. Did you go in the court house with them?

A. No sir, I was coming from the court house—I had been [fol. 233] attending Recorder's Court—to mail a letter in a box which is near the corner of the court house, and I saw Mr. Nye by the monument that stands directly in front of the court house and the court house steps, and I asked Mr. Nye to let's go fishing, and he said, 'No, I haven't time now,' and I said, 'Where are you going?' and he said, 'I am going to the post office,' and I said, 'Here is a box,' and he said, 'No, this is very important and I have got to go to the post office.'

Q. Did they go off to the post office together?

A. Yes sir.

Cross-examination.

Mr. Guthrie:

Q. Are you in the employment of the State of North Carolina?

A. I think so.

Q. Let's not think about it, are you or you not?

A. I think I am.

Q. How long have you been in their employ?

A. 11 years.

Q. Where are you making your headquarters?

A. Lumberton.

Q. Have you been subpoenaed?

A. Yes sir.

Q. Who served the subpoena, the U. S. Marshal?

A. I told him that before I came up here I would have to [fol. 234] be summoned to come.

(Mr. Guthrie examines the subpoena.)

Q. What is this thing here 'Service of the subpoena accepted the 27th day of October, 1939?' Who handed you that paper?

A. Mr. Howard Nye handed it to me.

Q. So that is the paper under which you came here?

A. Yes sir, it has got the U. S. Marshal's name on it.

Q. What Marshal served it?

A. No marshal—I have got them through the mail before.

Q. Where did you get this paper from?

A. I told you that Mr. Howard Nye handed me that paper.

Q. No U. S. Marshal or Clerk of the Court handed it to you?

By the Court: Did you sign the original and keep this copy?

A. I think so.

Q. Let's have the original, gentlemen.

Judge Varser: I haven't got it. Won't the envelope show it?

Q. You turned up in Durham this morning in a State automobile, hauling these witnesses up in a State automobile?

A. I brought them with me.

Q. Did you talk to them about who they were witnesses for or who they weren't?

A. Mr. Nye asked me if I would bring three witnesses up here and I didn't turn them down.

Q. That is the way you spend your time?

A. No sir.

[fol. 235] Q. Did you get a permit from your boss to be out of your district?

A. No sir, I never have asked for a permit.

Q. Not anywhere?

A. No sir—if I was going out of the State of North Carolina I would ask.

Q. Well, I am assuming that you were not summoned. Do you know about being summoned?

A. Well, the U. S. Marshal is on there, and if they called me to Washington I would go. I see the United States on there and if they do I will go.

Q. What did you say about seeing Howard Nye with a letter?

A. I didn't say anything about a letter.

Q. They were going fishing with you?

A. I didn't say they were going fishing. I asked him to let's go.

Q. How do you know it was on Wednesday morning, the 19th day of April, 1939, at about ten o'clock A. M.?

A. I make a daily report, sir.

Q. You make a report when you see a person on the street?

A. No sir, I just make a daily report to Raleigh.

Q. Where is your memorandum you made of the day you saw Howard Nye?

A. In my—

Q. Well, you remember that day?

A. Yes sir.

Q. You and Howard Nye are good friends?

[fol. 236] A. I don't have anything against him.

Q. You drove 140 miles for him?

A. 115 miles my speedometer registered.

Q. Who was with him on that day?

A. Mr. Elmore.

Q. Where?

A. Coming from the monument in front of the court house towards the court house.

Q. What did Mr. Howard have in his hand?

A. If he had anything in it I don't recall.

Q. What did Mr. Elmore have?

A. I don't recall.

Q. Nothing about them to attract your attention?

A. No sir.

Q. He said he was busy and could not go fishing?

A. He said he was going to the post office and I said put your letter in this box and save a few steps, and he said, 'No, it is very important.'

Q. And he said he didn't have a letter but it was a very important matter?

A. I didn't say that. If he did have, I didn't see it.

Q. But he said it was an important matter?

A. Yes sir.

Q. And so important that he could not go fishing?

A. Well he said he could not go fishing.

Q. Was old man Elmore walking straight?

[fol. 237] A. Yes sir.

Q. Did you talk with him?

A. No sir.

Q. Smell his breath?

A. No sir.

Q. What did he say?

A. Mr. Elmore did not speak to me.

Q. When did you hear of the fact that Mr. Howard Nye had been cited up for contempt?

A. Mr. Nye asked me if I had time to run out to the plant about a week ago.

Q. What did he tell you?

A. He asked me where I was on the 19th day of April of this year around ten o'clock, and I said I don't know right at the present and he said do you keep a written record, and I said yes I do—I said I keep one copy at my home and I send one to headquarters and I send one to Raleigh, and I told him that I would see him in the near future and see if I could recall where I was, and I went home and searched my reports until I found my report for April 19th, and I looked at it and I saw where I was attending Recorder's Court that morning from nine-thirty to ten o'clock, and then I departed from Lumberton. If I recall just right, it was about eleven o'clock, and then went to Fayetteville that afternoon and returned home.

Q. The original of that report is where?  
[fol. 238] A. Raleigh.

Q. At whose office?

A. Captain C. D. Farmer, State Highway Patrol, Raleigh.

Q. What is his official position?

A. State Highway Patrol.

Q. Now that report, the original to the report, shows on that report where you were on April 19th between nine o'clock — ten o'clock in the morning?

A. Yes sir.

Q. Does it show who you spoke to?

A. No sir.

Q. Where did it show you were?

A. It shows that I departed from Lumberton at eleven o'clock and then departed from Fayetteville at three o'clock.

By the Court: The record shows you were in court?

A. I attended the Recorder's Court.

Q. What time did you see Mr. Nye?

A. About ten o'clock.

Q. Do you remember the case in Recorder's Court?

A. No sir, I can't refresh my memory.



Q. You don't know where Mr. Elmore stayed that night?

A. No sir.

Q. Where did you meet these witnesses?

A. At Nye's Service Station.

Q. Mr. Eugene Nye's?

A. Yes sir.

[fol. 239] Q. Mr. Howard Nye asked you to?

A. No sir, he asked me if I had room to take them, and he said they would be out at the station.

Q. And you are taking them back?

A. Yes sir.

Q. Mr. Bell, did you go down to South Carolina with Mr. Tom McNeill and Mr. Mayers?

A. No sir, I don't think I have been down there with Mr. Tom.

Q. You didn't go?

A. No sir.

Q. You weren't the gentleman?

A. No sir, and I won't be the next time.

[fol. 240] MR. MACK KENLAW, witness for the respondent, having been duly sworn, testified:

Direct examination.

Judge Varser:

Q. I hand you a card for the purpose of refreshing your recollection \* \* \* red card for W. H. Elmore?

A. I am an employee of the Government. I work in the post office and the regulations of the post office won't allow me to give information about mail.

By the Court: About this matter I reckon they would.

(Mr. Kenlaw hands Judge Hayes book of regulations.)

A. If you say so, why then I am allowed to go ahead.

By the Court: I will give you the authority.

Q. Did you write that red card?

A. Yes sir.

Q. Do you remember seeing Mr. Elmore that day, whose name you wrote on the card?

A. He was in the office, but I don't know what day it was. They were both in there together and registered a letter.

Q. Do you remember who was attending to your registration?

A. No I wouldn't say,—so many people it is hard for me to remember.

Q. This card speaks for itself. It shows Durham, April 20th.

By the Court: To whom is it addressed?

Judge Varser: It says return to W. H. Elmore and on the reverse it is signed, W. B. Guthrie.

By the Court: Registered?

[fol. 241] A. Yes, sir.

Q. Did you have any inquiries as to whether it was all right for it to be returned to Box 53?

A. Well, now I don't recall—so many people—

Cross-examination.

Mr. Guthrie.

Q. According to your return receipt, it bears a seal.

By the Court: Does the card correspond with that envelope addressed to W. B. Guthrie?

Mr. Guthrie: Yes sir.

Q. Now that is a return receipt for this registered letter that I now show you, addressed to W. B. Guthrie, dated April 19th, 1939, after five days return to W. H. Elmore, Box 53, Lumberton, N. C. That is a return receipt for this letter?

A. Yes sir.

Q. Of course, you don't see the letter?

A. They present the letter for registration and ask for the return receipt.

Q. Did you hear Mr. Bell testify here that he saw Mr. Nye going to the post office that morning?

A. I heard him testify he was going in that direction.

Q. What hour was this letter mailed?

A. I can't tell you that.

Q. You don't know when that letter was mailed at Lumberton?

A. There is nothing on a letter to tell the hour.

Q. You don't know whether it was mailed in the morning or afternoon?

[fol. 242] A. I couldn't say.

Q. You mean to tell me that the hour is not stamped on registered letters?

A. We have got a little piece of wood that is made to stamp the registration so if there is any article in that registration that it won't damage and we take that and then stamp it.

Q. Do you still mean now that if I go in Lumberton to mail a registered letter you stamp the letter registered but you don't stamp the date?

A. On the back is the date, but not the hour.

Q. Who put Box 53 on that envelope?

A. I don't know.

Q. Was that already on there?

A. Yes sir.

Q. W. H. Elmore doesn't own any box?

A. No sir.

Q. Who owns Box 53?

A. Mr. Nye.

Q. My red acknowledgment of that letter was returned to P. O. Box 53? That went in Howard Nye's box didn't it?

A. Yes sir.

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[fol. 243] HOWARD NYE, respondent, having been duly sworn testified:

Direct examination.

Judge Varser:

Q. Mr. Nye, you live at Lumberton?

A. Yes sir.

Q. And you have an office where you conduct your business in Lumberton in the cotton mill district on the Seaboard Railroad.

A. Yes sir.

Q. It is in evidence here that Mr. Elmore came to your place with Mr. Mayers who lived on his farm in the early evening or late afternoon of April 19th, 1939. Had you seen Mr. Elmore before that time at any recent date?

A. No sir.

Q. Did you know Mr. Elmore when he used to live at what is known as the National Cotton Mill village?

A. Yes sir.

Q. Did you ever see him around your place of business before he moved to South Carolina?

A. Yes sir.

Q. Mr. Mayers testifies he went down there in South Carolina and was talking with Mr. Elmore, and he was going to speak to him about your wanting to see him about this suit, and that Mr. Elmore brought it up. Had you had any conversation with Mr. Mayers before that?

A. Yes sir.

Q. State what it was.

A. I had mentioned to Mr. Mayers on one occasion and had asked him if he knew Mr. Elmore and he said, 'I should [fol. 244] know him I sold him groceries' and I said, 'do you remember James'? and he said, 'yes, I sold him enough headache powders'.

Q. Did you say anything about wanting to talk with Elmore?

A. No sir.

Q. When did you say anything to Mayers?

A. First thing I said to Mr. Mayers was if he knew Mr. Elmore's son, did he know enough about him to testify about him in a law suit if he was called and he said he would be glad to. I think on the next occasion I told Mr. Mayers that in regard to James Elmore I understood the case had been dropped, that there was nothing to it, and on the next occasion we were talking I said a gentleman up in Durham now has the law suit in the Federal Court, and I believe, it was on this occasion that Mr. Mayers said, 'I have seen Mr. Elmore up in Lumberton about a week or two weeks ago and asked him to see if there was any gum timber down there'. In the meantime I contacted Mr. Mayers to clean up about three or four acres. So Mr. Mayers was going to get a certain amount of money and the timber, or either a certain amount of money and not the timber, and Mr. Mayers told me he might get in touch with Mr. Elmore in regard to some timber, and he might find out—in other words, I told him I would like to talk to Mr. Elmore in regard to the suit.

Q. Did you tell him who your daughter married?

A. Yes sir. I told him that Mataline married into the family and if I could be of any assistance, why just on



[fol. 245] account of that I would like to talk to Mr. Elmore.

Q. Did you ever talk to Mr. Bernard or Mr. Council?

A. I don't know Mr. Bernard.

Q. Did you ever talk about it with your son-in-law?

A. No sir.

Q. Did either of the partnership or company know anything about your talking to Mr. Elmore?

A. They didn't know anything whatsoever about any of it.

Q. After that conversation with Mr. Mayers, did you know anything about when Elmore was coming?

A. No sir.

Q. What were you engaged in?

A. Mr. Carwell and myself were checking up.

Q. Did anybody tell you what Elmore wanted to talk to you about before he came in to you?

A. No sir.

Q. When Mr. Elmore came what happened?

A. Mr. Mayers came to the door and said someone wanted to see me, and I said, 'Just a minute.' But after we got through checking up I said, 'Mr. Carwell, take the boys on home,' and after Mr. Carwell left, I went out there and found Mr. Elmore, so he came in and told me Mayers was down to see him and he asked him to bring him up and he wanted to talk to me about dropping that case, that Mr. Carlyle told him it wasn't anything to it, and he told Mr. [fol. 246] Mayers to bring him to see if I could help him.

By the Court: Which one told you that?

A. Mr. Elmore. I told Mr. and Mrs. Baldwin to excuse me for a few minutes and I would be right back. I put in a call for Mr. Timberlake at Laurinburg and I guess it was around seven-thirty or eight o'clock, and asked him how much trouble it would be for him to come to Lumberton. He said he couldn't possibly come, but he said, 'If you will wait until in the morning, I will be down early.' I asked Mr. Elmore to spend the night, but he said if he could get it fixed up then he would be glad. I told him Mr. Timberlake couldn't come then, and I told Mr. Timberlake to meet me early the next morning, which he did. And I believe Mr. Mayers came in, and I asked Mr. Elmore how about him spending the night with Mr. Mayers, but he said he didn't have room, and I said, 'How about spending the night with your son?' And he said, 'No, I would rather not do

that. I don't want him to know I am in town.' I asked him about staying at a hotel, and he said, 'No,' and so I asked him how about staying at my house. Mr. Elmore said, 'I will if Mr. Mayers will spend the night with me.' So Mr. Mayers wanted to go out on the farm, and Mr. and Mrs. Baldwin called me in there and I introduced Mr. Elmore to them, and they knew Mr. Mayers, and I asked Mr. and Mrs. Baldwin did they mind staying there a few minutes with Mr. Elmore while I was gone. When I came [fol. 247] back, Mr. Elmore and Mr. Mayers got in Mr. Mayers' car, and I told Mr. and Mrs. Baldwin that I would meet them up at the Sanitary Cafe in just a few minutes. And I showed them where to park the car and showed them over the house where I thought it would be necessary, and said, 'Now, you boys make yourselves at home. It may be late when I get back.' And I went on back and met Mr. and Mrs. Baldwin and we had a cup of coffee. We went on back to the plant to see about the truck, and I think we went back to the cafe around eleven o'clock. They went on, and I went on home. I got up the next morning I guess around six o'clock and went over to the plant, which I do every morning about six, and along about seven o'clock I was over at the cafe there and Mr. Timberlake came and I said, 'Well, I will run down to my brother's place. They have got a Mr. Elmore over here who wants some papers fixed up and I told him that I would pay for it.' But anyway, I went on down as I do every morning and had breakfast, and Mr. Mayers said, 'My car is giving me trouble,' and I said, 'I will take Mr. Elmore and go up town and meet you at Franklin McLoud's garage,' and we went up to Mr. Timberlake's office and we sat in the presence of Mr. Timberlake and I told him the best I knew about it, that he was worried about this case, that Mr. Carlyle had told him there wasn't any merits, and he would like to drop it, and as it [fol. 248] is Mr. Guthrie in Durham had been down to see him and wrote him lots of letters, but he was worried about it and wanted to get rid of it. He told me that and told Mr. Timberlake too. And I mentioned that Mataline married into the family and that I would like to get it fixed.

Q. Now, Mr. Nye, after you and Mr. Elmore talked to Mr. Timberlake, did Mr. Timberlake prepare any papers?

A. Yes sir. He prepared all the papers, and then he read them I believe twice. And he said, 'This might be a little bit out of line, but if this is what you fellows want,

here it is,' and he gave us the papers, and I guess it was around nine o'clock. Mr. Timberlake used the typewriter, and I said, 'What time will Miss McLean be in?' and he said, 'It is time for her now,' and then she walked in the door.

Q. After those papers were prepared, who took the papers over to Mr. Skipper's office?

A. Mr. Elmore. I went with him.

Q. Between the office and Mr. Skipper's office did you have any conversation again with Elmore?

A. No sir.

Q. Do you remember meeting Sergeant Bell?

A. Yes sir.

Q. Do you recall the conversation about fishing?

A. I think he must have thought I must have been going fishing. Mr. Elmore had on boots and he looked like a man [fol. 249] going fishing, and Sergeant Bell asked me was I going fishing, and I said I was going to the post office, and he said, 'Well you can use this box,' and I said, 'No, we have got something important.'

Q. Did you go in with Elmore?

A. Yes sir.

Q. Who talked with Skipper?

A. Mr. Elmore.

Q. Do you recall what was said?

A. Mr. Skipper called him 'Henry', and said, 'I haven't seen you in a long time.'

Objection by Mr. Guthrie overruled.

Q. Did Skipper ask Elmore if this was his wish?

A. He asked did he want to close the administration, and he said, 'Yes sir,' and he had him raise his hand and kiss the Bible and he said, 'Henry, this will cost you a dollar,' and he said, 'I don't believe I have got the change,' and I gave Mr. Charlie the dollar or gave Mr. Elmore the dollar.

Q. You furnished the dollar?

A. I think I did.

Q. Did you go out with Elmore?

A. Yes sir.

Q. Where was Miss Jenkins?

A. She was standing up working at a little table.

Q. After you went out with Mr. Elmore where did you go?  
[fol. 250] A. Post office.

Q. And there mailed the letters?



A. Yes sir. One to Judge Hayes and one to Mr. Guthrie.

Q. After that was done?

A. We went around to Mr. Frank McCloud's garage.

Q. Now, during this whole period of conversations and transactions in the afternoon of the 18th and throughout the morning of the 19th until Elmore was left by you at McCloud's garage, did you see any signs that Mr. Elmore was under the influence of liquor?

A. No sir.

Q. Did you furnish him any or Mayers?

A. No sir.

Q. When he went up to your house that night, did you then see any sign that Elmore was drinking?

A. No sir.

Q. Did you ever hear of any charge of contempt or claim that Elmore had any liquor until you got these papers?

A. No sir.

Q. Did you give him any money or make him any promises or hold out any inducement?

A. No sir. I wanted to talk to Mr. Elmore, but apparently he was so anxious he didn't give me any opportunity.

Q. Did you hear Mr. Elmore or Mr. Timberlake talking about whether there was any property belonging to the estate of James Elmore?

A. Mr. Elmore said there wasn't anything, and no obligations [fol. 251] and no debts, only what he had paid personally himself.

Q. Do you know about when James Elmore died?

A. No sir.

Q. Mr. Nye, in doing what you stated that you did, did you have any intention or purpose to interfere with this or intend any disrespect for this Court?

A. I sure didn't.

Q. Did you know or have a thought at that time that there was anything wrong in what you did?

A. No sir.

Q. How long had you known Mr. Timberlake? Ever since he was in Lumberton?

A. Yes sir.

Q. Did you know him when he was teaching and coaching the high school?

A. Yes sir.

Q. Your daughter went to school there?

A. Yes sir.



Q. State whether you had confidence in his ability as a lawyer.

A. Yes sir.

Q. Did you know then how Mr. Timberlake stood in Lumberton, both as a lawyer and as a man?

A. High in my way of speaking.

Q. How long—do you recall how long he has been writing your papers?

A. Something like three years.

[fol. 252] Q. He is a partner now with whom?

A. Mr. Johnson of Johnson & Floyd.

Q. Did you ever pay Mayers anything for going down to South Carolina?

A. No sir.

Q. He says he borrowed \$10.00 from you, stating that he had to have some money to pay for fixing his car. Did he pay you that back?

A. Yes, sir.

Q. How long has he been a tenant on any farm of yours—Hunters' Lodge or any other?

A. Two years.

Q. Has he paid any debts to you?

A. He has paid me all—yes sir—there was one debt for his father's funeral and one for his boy's schooling.

Q. You have lived in Robeson County all your life?

A. Yes sir.

Q. Born there?

A. Yes sir.

Q. You didn't go down in South Carolina at all in this matter until after it came up and you were looking for evidence?

A. Not until after I was in Greensboro, I went down once with Albert.

#### Cross-examination.

Mr. Guthrie:

Q. Mr. Nye, you told the Judge you had great confidence in Mr. Timberlake's ability as a lawyer.

[fol. 253] A. Yes sir.

Q. You went to him because of his ability to kill this suit pending in this Court?

A. Well, I wouldn't say that. Mr. Timberlake is a young

lawyer. Mr. Timberlake will get in my car and make a trip cheaper than Judge Varser or some of the others.

Q. But you were interested in having the suit dismissed?

A. Yes sir.

Q. And you thought Mr. Timberlake had plenty of schooling to do the job and get paid for it?

A. Mr. Timberlake wrote them.

Q. Who paid for them?

A. I believe I said in Greensboro I did.

Q. I believe you said in Greensboro you told Mr. Timberlake you wanted it fixed right?

A. I think I did.

Q. And although that is addressed to me, and return to Mr. Elmore you took it to the post office and registered it and put Box 53 on the envelope?

A. Well, I went to the post office with it and asked Mr. Kenlaw if it would be all right and O. K. for Mr. Elmore's mail to come back to my box.

Q. Would you mind filing that receipt with the Clerk of this Court? I am asking you if you object?

A. I would rather have this myself.

[fol. 254] Q. Who wrote that Box 53 on the envelope?

A. I didn't.

Q. You are the man that put those stamps on it, aren't you?

A. I think that the gentleman who registered this letter put those stamps on it.

Q. I ask you, didn't you pay for those stamps?

A. I believe I did.

Q. You took the letter and put it in that envelope?

A. I didn't say I did.

Q. You folded it up?

A. Well, I don't know whether I did that or Mr. Timberlake did that.

Q. Did you hand it to the clerk for registration?

A. I went with Mr. Elmore to the window.

Q. I asked you, if you handed it to the clerk for registration.

A. I don't know who handed it to him. I know I asked him if it would be O. K.

Q. Why, he told you he couldn't take it unless you gave a return address, didn't he?

A. No sir. He didn't tell me.

Q. He wrote Box 53 on that envelope?

A. I don't know.

Q. Did it have that on there when you carried it to the post office?

A. I don't recall. Mr. Timberlake might have done it.

Q. I asked you if it had it on there when you carried it [fol. 255] to the window.

A. I don't remember.

Q. Where is the receipt you received for that registered letter?

A. What receipt?

Q. When you handed this letter to be registered, where is that receipt that the post office gave you?

A. Does Your Honor want it?

By the Court: Go ahead. It doesn't make any difference.

(Mr. Nye looks for receipt—hands it to Mr. Guthrie).

Q. That is the receipt?

A. Yes sir.

Q. Did you ask for a return receipt from the Judge?

A. That is the receipt from the Judge.

By the Court: Is that from me?

A. Yes sir. (Handing receipt to Judge Hayes).

By the Court: That is signed by my secretary.

Q. You sent the letter to the Judge by registered mail, and you made the Judge return an acknowledgment to you. Why did you register the letter?

A. Well, if you want anything to get where you want it to go, I think the best way to do is to register it.

Q. You didn't trust it in the mail?

A. Yes sir.

Q. And you also wanted the signature of Judge Hayes?

A. It was all right about Judge Hayes and you, but if [fol. 256] a letter—

Q. But you wanted a return receipt, and you paid extra postage to do that?

A. Well, yes.

Q. Did Mr. Timberlake tell you to do it?

A. He said that would be proper, it would be O. K.

Q. Have you got in there any letters that I have written Mr. Elmore?

A. I believe I have.

Q. What are you doing with them?

A. He probably gave them to me.

Q. Let me see them.

A. Is it all right, Judge?

By the Court: Yes, it is all right. I understood Mr. Timberlake to say that you were the one suggested that Elmore sign the final account and be discharged as administrator?

A. Well, Judge, I told Mr. Timberlake what Mr. Elmore wanted and asked him what to do about it—the best thing to do about it.

By the Court: The question I am asking is this—did you suggest to Mr. Timberlake that he prepare the papers discharging the administrator or did Mr. Timberlake suggest that?

A. Mr. Timberlake.

By the Court: So that idea didn't originate in your mind?

A. No sir.

[fol. 257] Q. Will you pass me the letter that I wrote Mr. Elmore? Any letter addressed to Mr. Elmore by me or copy of letter to Mr. Elmore?

(Judge Varser hands him letter).

Judge Varser: I believe that is the only one I have.

Q. May I ask—is that a letter with my signature? (Pointing to papers Mr. Nye is looking through). Well, then you are interested?

A. Here is a telegram.

Q. All right, let me have the telegram, please sir. What are — doing with a telegram I sent to Albert Elmore?

A. Well, that is the one I showed you in Greensboro. The boy came to me and asked me what I could do about his father, about abusing his father.

Q. Are you the man who fixed up that affidavit?

A. I went with Albert to Mr. Timberlake's office.

Q. (Reading telegram) 'I have stenographic report of my conversation with you and your daddy Sunday April twenty-third. Do you realize that you have sworn to in your affidavit. The draftsman of that affidavit evidently is not aware that I have in typed form from stenographers notes every question and answer between you and me and me and your daddy. Are you crazy or have you been paid



something for your affidavit?' Signed William B. Guthrie.  
What are you doing with that telegram?

A. No answer.

By the Court: Answer it.

[fol. 258] A. This telegram was brought to me by Albert Elmore the following Monday after he was down to South Carolina.

Q. In your office in Lumberton? He was there?

A. He came there.

Q. He was there and told you of my business with his father with a stenographer to report the conversation? And Albert showed you this telegram, and you said, 'Well, let me have it,' and you have had it ever since.

A. I didn't say that.

Q. You have had it ever since?

A. Yes sir.

Q. You knew on the following Monday after I was there on Sunday. Albert told you?

A. He told me you were down there Sunday. I knew it when he came down and informed and told me he was there and asked was there something I could do to keep you from going down there—to keep you from abusing his father. And I called at Mr. Timberlake's office and he was in, and I said, 'I am coming up to see you with Mr. Elmore's son,' and Mr. Timberlake drew up the affidavit, and I went with him to the Clerk's office and let him sign it.

Q. And then you got hold of Albert and tried to get at me through him?

Objection by Judge Varser sustained.

By the Court: These two papers referred to—now we want to know if you hired Mr. Timberlake to draft them?

[fol. 259] A. I told Mr. Timberlake Elmore's son was there, and I told him we wanted to come up. Albert told him two or three things, and he read it to him, and Albert said, 'Yes sir. That's the facts,' and he turned to me, and I said 'if these are the facts and he wants to certify it—'

By the Court: What was done after you took him to the Clerk?

A. Albert mailed them. I think I went to the post office with him.

By the Court: You went to the post office to mail it?

A. Yes sir.

Q. Did you register that one?

A. I don't recall.

Q. Have you got a receipt?

A. No sir.

Q. Now that is dated April 24th, isn't it?

By the Court: Sworn to on the 25th.

Q. How much did you pay Albert for the information?

A. Not anything.

Q. Well, why did you do it for him?

A. Well, you might call it trying to be a good fellow.

Q. You call that a good fellow stabbing me in the back?

By the Court: Don't answer that.

Q. You are in the oil business?

A. Yes sir.

Q. Selling Puroil?

[fol. 260] A. Yes sir.

Q. You used to represent the Standard?

A. I was in it fourteen years.

Q. Didn't you sell a pair of mules of the Standard Oil Company for \$500.00 and write them that these mules were lame and you told them you could sell them for \$250.00 and you pocketed the balance? And didn't they break their contract with you?

A. They never had a contract.

Q. Didn't you sell a pair of Standard's mules and write them that the mules were lame and you had already sold them?

A. Never heard of it.

Q. Fourteen years and a clean record?

A. Yes sir.

Q. You were called from the BC Remedy Company telephone—by the way, what is your telephone number?

A. My business phone is 53.

Q. And post office box 53? What is your residence phone?

A. 421.

Q. According to the evidence, you were called at your business phone on April 6th at three-forty-three p. m. Who did you talk to?

A. I don't recall. What is the date?

Q. April 6th. The call for you was filed here. Who did you talk to?

[fol. 261] A. I don't recall. Does it say who talked to me?

Q. Did you have any business dealings with the BC Remedy Company on April 6th that necessitated their calling you down there? Who would be calling you from there to your business telephone?

A. I wouldn't say. It might have been my daughter calling or my son. I wouldn't say.

Q. Did you talk to anybody besides your daughter during the month of April over the Remedy phone?

A. I don't recall.

Q. Did you during the month of April, 1939, talk to anybody in Durham—a call went to your business phone. Was it C. T. Council, Jr., or your daughter? Did either call you?

A. Not that I recall.

Q. You mean to say you don't know or you just don't remember?

A. Well, it could be from my daughter, from my boy, or from her husband.

Q. How about from the Senior Council's phone on April 24th, and it was filed here at eleven-seven p. m.

A. Who did it go to?

Q. To phone 421. Not from your son-in-law's phone, but from Mr. Council Sr.'s phone. To phone 421, filed at eleven-seven that night. Did you talk to anyone that night?

A. I don't recall.

[fol. 262] Q. On April 27th, it appears from the evidence introduced here, that a call was filed here at six-eight p. m. from C. T. Council, Sr.'s phone to phone 53 Lumberton. Who did you talk to then? Originating from C. T. Council's phone?

A. Must have been my daughter calling me.

Q. Somebody must have talked to you—you say it might have been your daughter.

A. Might have been my daughter or my son-in-law.

Q. It appears here that on April 1st at a quarter to eleven o'clock you were called over the phone of your son-in-law—you were called at 421 and it went to you personally, and you were not there at home and they found you at the Sanitary Cafe. Who did you talk to?

A. Must have been my daughter.

Q. Now on April 8th, there was a call from your son-in-law's phone to your business phone. Who was talked to then?

A. From Durham to Lumberton?

Q. Yes. Who did you talk to?

A. It was either my daughter or my son, or it might have been her husband.

Q. Have you ever had any telegraphic communications with Mr. Council, Sr., or the BC Remedy Company?

A. No sir.

Q. Mr. Elmore qualified as administrator on the 7th day of August, 1937. Was your daughter married before or [fol. 263] after that date to Mr. C. T. Council, Jr.?

A. It was on November 18th, 1937.

Q. You knew this suit was pending because you had heard Mr. Carlyle discuss it?

A. It was in the paper.

Q. But when it was brought you hadn't entered the family by marriage?

(Mr. Nye looks for papers.)

By the Court: While he is looking for that. Did you talk with any person over the telephone from Lumberton to Durham concerning your activities with Elmore about this case?

A. No sir.

By the Court: Or in connection with the case in any way?

A. No sir.

Q. Mr. Elmore qualified as administrator on the 7th day of August, 1937. I understand your daughter was married after that?

A. I wouldn't swear to that.

Q. Don't you know the date your daughter was married?

A. I have told you once I thought it was November 18th, 1937.

Q. When did you become interested in this suit?

A. I got too much interested in it when Mr. Elmore came into the office.

Q. And you say you told Mr. Mayers that you were interested in having this suit ended because your daughter had [fol. 264] married into the Council family?

A. I couldn't tell you the exact words, but I told him I would like to have an opportunity to discuss it with Mr. Elmore.



Q. I ask you if you didn't swear today that you would be glad if Elmore would dispose of the suit and not trouble them any more, and that Mr. Mayers knew Elmore, and you told him if he had an opportunity to see him, to speak to him about it, and tell him you would like to see him? (Showing copy of answer of R. H. Nye filed in the cause.)

A. Let's see that please. Your Honor, I am not denying anything. The Judge wrote those up and I signed them in a hurry. I am not denying anything. (Glances at copy of answer.) That is the same thing. Yes sir.

Q. You say the idea was yours?

A. Yes sir. I will admit to this.

Q. You began discussing the question of a dismissal of this suit because your daughter married into the Council family, as early as February, 1939, before Mr. Elmore came to see you in April, 1939?

Objection by Judge Varser overruled.

A. I talked to Mr. Mayers about this, that I would like to talk to Mr. Elmore if he saw him sometime—that I was interested in the case because of my daughter.

Q. You had discussed with Mr. Mayers some several weeks and months before you saw Mr. Elmore on the 19th, [fol. 265] and told him that you would like to see this suit ended, didn't you?

A. Once. Yes sir.

Q. How many times had you talked to Mr. Mayers expressing your likes—or rather you would like to see the suit ended—before you saw Elmore on the 19th day of April, 1939?

(Request to repeat the question.)

Q. How many times did you express to Mr. Mayers you would like to see this suit ended because your daughter was in the family?

A. I saw him once—

By the Court: That was while the case was pending in the State Court?

A. Yes sir. And the next time I had a conversation with Mr. Mayers I said, 'They tell me there is no suit.' The next time I saw him I told him it had started in the Federal Court.

Q. When did you find out that Mr. Mayers had gone to South Carolina?

A. When he came to the office.

Q. When was that?

A. April 18th.

Q. He wasn't buying any timber at all, was he?

A. I don't know about that.

Q. Well, so far as you know, he never bought any timber?

A. I couldn't say, I don't know.

[fol. 266] Q. When did you first hear he was looking out to buy some timber?

A. Well, I traded with him about some land.

Q. But when did you learn that he was looking for some timber so far away as South Carolina?

A. Mr. Mayers said he saw Mr. Elmore on the street, and I said, 'Did you mention that I wanted to talk with him?' and he said, 'No, he was in a hurry,' but he was going to go down there to see about some timber.

Q. He lives on your farm?

A. Yes sir.

Q. He lives on your place and in your house?

A. Yes sir.

Q. And he is a tenant farmer?

A. Yes sir.

Q. He spoke of buying timber. Where did he get any money to buy timber?

A. I couldn't say.

Q. When was the last time you saw Elmore before you saw him on April 18th?

A. I couldn't have seen Mr. Elmore in six or eight months or a year.

Q. How did you find out where he was living?

A. Mr. Mayers.

Q. How long before the 18th day of April?

A. In February or March.

[fol. 267] Q. Of this year?

A. Yes sir.

Q. And he turned up one day in company with your employee, your crop tenant, Mr. Mayers, unannounced, and were you surprised to see him?

A. Well, I wasn't surprised any more than I might be surprised to see anyone else.

Q. You had never helped him before?

A. No sir.

Q. When he turned up there, did Elmore ever leave your sight or the sight of your employee Mayers, or of your employee Mr. Baldwin, until you sent him home?

A. Mr. Mayers was not working for me at that time.

Q. From the time he came until he was sent home by you, he was in your sight or your employees or Mr. Mayers?

A. He was in the presence of Mr. Baldwin in the office about 30 minutes, and Mr. Mayers doesn't work for me now.

Q. He is cropping for you?

A. Well, a farm is different. I may not go out there in three or four months.

Q. Mr. Nye, I ask you, if that man, Mr. Elmore, was not either under your eye or in the presence of Mr. Mayers or Mr. Baldwin until you left him to be carried home?

A. Yes and no. Well, he wasn't under my eye or Mr. Baldwin's or Mr. Mayers all the time—yes he was too.

Q. And you say he had on ordinary boots?

[fol. 268] A. Yes sir.

Q. And there was one bed in the room?

A. Yes sir.

Q. Did you put him to bed with his boots on?

A. I didn't put him to bed.

Q. Well, he either slept with them on or put them on the floor in your room.

A. It is my boy's room.

Q. Well, you own the house, don't you?

A. Yes sir.

Q. Did he have them on the next morning?

A. Yes sir. He begged my pardon and asked me if he messed up my bathroom with his boots—he had to wash them in the bathroom.

Q. Well, you didn't care how much he messed up your private bathroom so long as he messed up this suit against the BC, did you?

A. Well, he told me he had washed his boots off in the bathroom.

By the Court: Mr. Nye, when you said under oath at Greensboro in this matter sometime after Elmore made his request to have this suit dismissed, in this examination, as the Court seems to recall it—I want to be sure about it—did you make the statement then that the reason why you had the administrator dismissed is that you wanted to be



a good fellow, and wanted to fix it so it could not be brought [fol. 269] back any more?

A. Judge, I said that I was interested in it on account of my daughter marrying into the family—if I could be of any assistance.

By the Court: Is that why you wanted the administrator discharged?

A. Well, Mr. Timberlake advised us of that.

By the Court: Well you used the expression there in Greensboro that you wanted to get it stopped for good?

A. I believe I used the expression that I wanted to do my best.

By the Court: State you did have it fixed?

A. Yes sir.

By the Court: Did you state up there at Greensboro anything whatever about the fact that Mr. Mayers had brought this fellow over there to you, or about you had kept him in your home that night?

A. No sir.

By the Court: He came to your place of business to see you?

A. Yes sir.

By the Court: You didn't discuss this other business?

A. Yes sir.

### Redirect examination.

Judge Varner:

Q. Were you asked anything at Greensboro by Mr. Guthrie or did the Court call for a statement about where he stayed that night?

[fol. 270] A. No sir. No one but Mr. Guthrie.

Q. Did you have any idea when you went to Timberlake's office what his methods would be?

A. No sir.

Q. Was the method that was followed—that is, the legal procedure by Mr. Timberlake—his suggestion, and without his suggestion would you know what to do?

A. No sir.

Q. Did you have any purpose other than to carry out the wishes of Elmore?

A. No sir.



Q. Did you see any signs of Elmore that he didn't know what he was doing?

A. No sir.

Recross-examination.

Mr. Guthrie:

Q. You are rather proud of what you have done, aren't you?

Objection by Judge Varser sustained.

Mr. Guthrie: I desire to offer these registered receipts—these two red receipts—and this telegram and ask that the Clerk keep them and take charge of them.

(Discussion of date agreeable to all concerned to hear the arguments of counsel.)

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[fols. 271-272] RENEWAL OF MOTION TO DISCUSS

At this point, respondent- rest, and renew their motion to dismiss, which was overruled, and respondents except.

And the Court continued further hearing of the matter to be heard again at Durham on November 17th, 1939, at ten o'clock a. m., to hear argument of counsel.

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[fol. 273] IN DISTRICT COURT OF THE UNITED STATES FOR THE  
MIDDLE DISTRICT OF NORTH CAROLINA, DURHAM DIVISION

W. H. ELMORE, Administrator

v.

C. T. COUNSEL, et al., Trading as B. C. REMEDY Co.

FINDING OF FACTS AND JUDGMENT—Filed February 8, 1940

I

On March 14, 1939, W. H. Elmore, Administrator of his son, James Elmore, deceased, filed affidavit with the Judge of the District Court of the United States for the Middle District of North Carolina in which he stated he had a meri-

torious action for damages against C. T. Council, et al., trading as B. C. Remedy Co. for the wrongful death of James Elmore, deceased; that on account of poverty neither he nor the estate could make cash deposit or give bond securing the payment of cost, and prayed to prosecute as a pauper.

## II

Leave to prosecute as a pauper and an order appointing W. B. Guthrie, Esq., as attorney to represent him was entered by this court March 16, 1939.

## III

On March 18, 1939, the plaintiff filed a complaint against C. T. Council and Germain Bernard, partners trading as B. C. Remedy Company in which it was alleged that the death of plaintiff's intestate had been caused by the wrongful act of the defendants thereby damaged the plaintiff in the sum of \$30,000 and praying judgment therefor.

## IV

Summons issued March 18, 1939 and was duly served on the defendants March 22, 1939.

## V

Answer was filed April 29, 1939 and the case was at issue and awaiting trial on the merits.

## VI

On April 19, 1939, W. H. Elmore mailed to Judge Johnson J. Hayes, Greensboro, N. C., a letter requesting the dismissal of the above case. He also enclosed a copy of his letter of even date to his attorney, W. B. Guthrie, Esquire, requesting him to have the case dismissed. The resident [fol. 274] judge of the middle district of North Carolina, received the letters.

## VII

The court, at request of W. B. Guthrie, Esquire, held up action pending further investigation by Mr. Guthrie.

## VIII

On July 20, 1939, the respondent, Howard Nye, in response to a subpoena, appeared before this court in Greens-

boro, N. C., represented by his present counsel, Judge L. R. Varser. He was examined on oath in open court concerning his knowledge of the letters to Judge Hayes and W. B. Guthrie, Esquire.

## IX

The respondent admitted that he employed a lawyer, Mr. — Timberlake, of Lumberton, N. C., and paid him a fee to fix up the paper for Elmore to stop the suit in the federal court and that he told the lawyer to fix it so that it would be stopt for good. He said that he did this because W. H. Elmore came to his place of business and said he wanted to drop the whole thing.

## X

The lawyer dictated, and his secretary wrote the letters to Judge Hayes and to W. B. Guthrie, Esquire, above referred to, and also prepared a final account for Elmore as administrator. Respondent Nye took Elmore to the office of the Clerk of the Superior Court and paid the Clerk \$1.00 and had the administrator discharged, and then took him to the Post Office and registered the letters above referred to, demanding return receipts, to be sent to his post office box 54. Respondent paid the postage and all expense in connection therewith.

When respondent Nye testified before the court at Greensboro, N. C., he said in substance that Elmore came to his place of business and requested him to have the case in the federal court stopt, and made no statement indicating that he had sent after Elmore or that he kept Elmore in his home the night before the papers were prepared.

## XI

On August 29, 1939, defendants filed a motion to dismiss the original action on account of the administrator having been discharged by the Clerk of Superior Court of Roberson County on April 19, 1939.

## XII

On September 29, 1939, in open court at Durham, N. C. W. H. Elmore, under subpoena, testified on oath that L. C. Meares came to the home of W. H. Elmore near Conway, S. C. and told Elmore that R. H. Nye of Lumberton sent

him to get Elmore and take him to Lumberton, N. C. for a conference with Nye about his suit pending in federal court; that Meares furnished liquor to Elmore, got him under the influence of it, and took him to R. H. Nye's place of business in Lumberton; that it was night and Meares took [fol. 275] Elmore to Nye's home where they spent the night and continued drinking; that early next morning Nye got him to sign the letters which Elmore did not prepare and to swear to the final account; that he did not know what he was doing and that the affidavit of final account was false.

### XIII

On September 30, 1939, on motion of W. B. Guthrie, as appears of record, this court issued a rule against R. H. Nye and L. C. Meares to appear before this court at Durham, N. C., on October 14, 1939, and show cause if any, why they should not be adjudged in contempt of court.

### XIV

The hearing was continued to October 30, 1939 when R. H. Nye appeared in person and by his counsel, L. R. Varser, and L. C. Meares appeared in person and by his counsel, T. A. McNeil. The respondents filed pleadings which appear of record.

### XV

Twenty-three witnesses were sworn and examined and arguments made by counsel—and briefs were to be filed later.

### XVI

Respondent Nye's daughter married the son of defendant C. T. Council and Nye knew the administrator had brought an action in the state court of Roberson County on the same cause of action and after taking a non-suit there brought this action in the federal court to recover damages.

### XVII

Respondent Nye, after discovery that his tenant, L. C. Meares, was personally acquainted with W. H. Elmore, procured him to go to South Carolina and bring Elmore to Lumberton in order that Nye might get this case in the



federal court stopt; that Nye and Meares acted in full concert and for the accomplishment of the same result.

### XVIII

W. H. Elmore is illiterate, feeble in health and equally feeble in mentality, and both respondents had knowledge thereof.

### XIX

That respondent Nye is a shrewd business man, of extraordinary mentality and dynamic energy and ingenuity; that although Elmore had on boots and was ditching when Meares arrived and, although he lived with his son nearby, Meares did not give him time to go home and change clothes but took him away with the promise to return him that night. As soon as Nye talked to him, Nye tried to get his lawyer, Mr. Timberlake, but he was out of town, and Nye then contacted him by long distance phone, making appointment to [fol. 276] meet at the lawyer's office next morning at 8 A. M. In the meantime Nye and Meares arranged to keep Elmore in their presence until the next morning after the papers were executed, notwithstanding the fact that they knew Elmore had a son living in Lumberton. Nye had Meares and Elmore to sleep in his house that night.

### XX

On the following morning, Nye took Elmore to Mr. Timberlake's office and told him that he (Elmore) wanted to drop his suit in federal court against B. C. Remedy Co., and that he (Nye) wanted it fixed up in a final way, so as to end it once and for all. Mr. Nye told Attorney Timberlake he wanted Elmore discharged as administrator and the letters written.

### XXI

The writing of the letters and the filing of the final account were procured by respondent Nye for the express and definite purpose of preventing the prosecution of the civil action in the federal court and with intent to obstruct and to prevent the trial of the case on its merits in the federal court.

### XXII

That the conduct of the respondents did obstruct and impede the due administration of justice in this cause; that

the conduct has caused a long delay, several hearings and enormous expense.

### XXIII

That respondent Meares did furnish liquor to Elmore and got him under his (Meares') control, but Elmore did not remain intoxicated while he signed the letters and false final account; but he was completely under the control and domination of Meares and Nye; that neither of the respondents paid Elmore any sum or promised him any sum whatsoever, to get the case stopt.

Upon the foregoing facts, the court is of the opinion and so holds, that the conduct of the respondents is misbehavior so near to the presence of the court as to obstruct the administration of justice and accordingly adjudges each of them guilty of contempt.

It is therefore ordered that R. H. Nye pay the costs of the contempt proceedings, including the sum of \$500.00 to W. B. Guthrie, Attorney, through whose untiring efforts and at great expense discovered and brought to the attention of the court the contempt for its authority, and that he pay a fine of \$500.00.

It is further ordered that L. C. Meares pay a fine of \$250.00 and that each defendant stand committed until he complies with the judgment or is otherwise discharged as provided by law.

This the 8th day of February, 1940.

(Signed) Johnson J. Hayes, U. S. Judge.

[fols. 277-279] IN UNITED STATES DISTRICT COURT

[Title omitted]

#### EXCEPTIONS TO FINDINGS OF FACT AND JUDGMENT

To the findings of fact and judgment, the respondents Nye and Mayers, each for himself except.

Each respondent excepts to findings of fact numbers two (2) six (6) eight (8), nine (9), ten (10), eleven (11), twelve (12), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty two (22), twenty-three (23) and to the ruling "That the conduct of the re-

spondents is misbehavior so near to the presence of the Court as to obstruct the administration of justice, and accordingly adjudges each of them guilty of contempt." And to the order that R. H. Nye pay costs of the contempt proceeding, including the sum of Five Hundred Dollars (\$500.00) to W. B. Guthrie, attorney, and to the ruling that "Through whose W. B. Guthrie's untiring efforts and at great expense discovered and brought to the attention of the Court the contempt of its authority" and to the ruling that he (R. H. Nye) pay a fine of \$500.00

And the respondent L. C. Mayers excepts to the ruling that he pay a fine of \$250.00

And both respondents, each for himself excepts to the ruling that each defendant stand committed until he complies with the judgment or is otherwise discharged as provided by law.

L. R. Varser, O. L. Henry, Attorneys for R. H. Nye, Respondent; T. A. McNeill, Attorney for L. C. Mayers, Respondent.

The foregoing exceptions are allowed and ordered to be entered of record. This the 8th day of February, 1940.

Johnson J. Hayes, U. S. District Judge.

[fol. 280] IN UNITED STATES DISTRICT COURT

[Title omitted]

#### STATEMENT OF POINTS TO BE RELIED ON BY APPELLANTS

Now Come Respondents, R. H. Nye and L. C. Mayers, appellants, and state the points to be relied upon on appeal as follows:

1. That the Court erred in denying the motions of the respondents to dismiss the order to show cause upon the grounds set out in said motions that the things alleged in the motion for the order to show cause were not committed, if at all, within the Middle District of North Carolina, but were alleged to have been committed in South Carolina and in Robeson County, North Carolina, relating to matters concerning the Probate Court of Robeson County, and with respect to papers to be filed in said Probate Court, and that none of the alleged grounds for contempt had been com-

mitted in the Middle District of North Carolina, or within the jurisdiction of the Court, and in failing to discharge the rule and to strike out the service for lack of jurisdiction, and for that the order to show cause was not based upon any affidavit made in said contempt proceeding.

[fol. 281]. 2. For that the Court erred in respect to his Findings of Fact, as follows:

(a) In making Findings of Fact No. 2, which is "leave to prosecute as a pauper and an order appointing W. B. Guthrie, Esq., as attorney to represent him was entered by this Court March 16, 1939, for that said finding is not material or relevant in respect to the charge of contempt against these respondents.

(b) In making Finding of Fact No. 6, as follows:

"On April 19, 1939 W. H. Elmore mailed to Judge Johnson J. Hayes, Greensboro, N. C., a letter requesting the dismissal of the above case. He also enclosed a copy of his letter of even date to his attorney, W. B. Guthrie, Esq., requesting him to have the case dismissed. The Resident Judge of the Middle District of North Carolina received the letters', for that the said finding shows no contemptuous conduct and is not a part of any contemptuous plan or scheme.

(c) In making the 8th Finding of Fact as follows:

"On July 20, 1939, the respondent, Howard Nye, in response to a subpoena, appeared before this Court in Greensboro, N. C., represented by his present counsel, Judge L. R. Varser. He was examined on oath in open court concerning his knowledge of the letters to Judge Hayes and W. B. Guthrie, Esquire," for that said finding is immaterial and irrelevant to the contempt inquiry, and the examination therein referred to was had before the order to show cause was issued, and no wrongful act on the part of the respondent Nye is stated therein.

(d) In making Finding of Fact No. 9 as follows:

"The respondent admitted that he employed a lawyer, Mr. — Timberlake, of Lumberton, N. C., and paid him a fee to fix up the paper for Elmore to stop the suit in the [fol. 282] federal court and that he told the lawyer to fix it so that it would be stopt for good. He said that he did this



because W. H. Elmore came to his place of business and said he wanted to drop the whole thing", for that said finding states nothing contemptuous or without respect for the Court, and is irrelevant and immaterial in respect to contempt.

(e) In making Finding of Fact No. 10 as follows:

"The lawyer dictated, and his secretary wrote the letters to Judge Hayes and to W. B. Guthrie, Esquire, above referred to, and also prepared a final account for Elmore as administrator. Respondent Nye took Elmore to the office of the Clerk of the Superior Court and paid the Clerk \$1.00 and had the administrator discharged, and then took him to the Post Office and registered the letters above referred to, demanding return receipts, to be sent to his post office box 54. Respondent paid the postage and all expense in connection therewith.

When respondent Nye testified before the court at Greensboro, N. C., he said in substance that Elmore came to his place of business and requested him to have the case in the Federal Court stopt, and made no statement indicating that he had sent after Elmore or that he kept Elmore in his home the night before the papers were prepared," for that the said finding does not constitute contempt, and the evidence does not support so much thereof as states that the "respondent Nye took Elmore to the office of the Clerk of the Superior Court" and "had the administrator discharged" and "then took him to the Post Office and registered the letters above referred to demanding return receipts to be sent to his post office box 54", and that said finding in its entirety does not constitute contempt, and with respect to the testimony of respondent Nye at Greensboro, it does not appear therein that Nye was examined with respect to any charge that he had sent after Elmore or had kept Elmore in his [fol. 283] home the night before the papers were prepared, and that said finding is immaterial and irrelevant to the inquiry in contempt.

(f) That the Court erred in making Finding of Fact No. 11 as follows:

"On August 29, 1939, defendants filed a motion to dismiss the original action on account of the administrator having been discharged by the Clerk of Superior Court of Robeson County on April 19, 1939," for that the same states

acts on the part of the defendants and not on the part of the respondents and is immaterial and irrelevant to the contempt inquiry.

(g) That the Court erred in making Finding of Fact No. 12 as follows:

"On September 29, 1939, in open court at Durham, N. C., W. H. Elmore, under subpoena, testified on oath that L. C. Meares came to the home of W. H. Elmore near Conway, S. C. and told Elmore that R. H. Nye of Lumberton sent him to get Elmore and take him to Lumberton, N. C. for a conference with Nye about his suit pending in federal court; that Meares furnished liquor to Elmore, got him under the influence of it, and took him to R. H. Nye's place of business in Lumberton; that it was night and Meares took Elmore to Nye's home where they spent the night and continued drinking; that early next morning Nye got him to sign the letters which Elmore did not prepare and to swear to the final account; that he did not know what he was doing and that the affidavit of final account was false," for that the same is not supported by the evidence in this inquiry and the inquiry on September 29, 1939 was on a motion made by the defendants to dismiss the original action when the respondents were not present at said hearing and the testimony of Elmore was ex parte as to these [fol. 284] respondents and the statements therein were later denied by them.

(h) For that the Court erred in making Finding of Fact No. 17, as follows:

"Respondent Nye, after discovery that his tenant, L. C. Meares, was personally acquainted with W. H. Elmore, procured him to go to South Carolina and bring Elmore to Lumberton in order that Nye might get this case in the federal court stopt; that Nye and Meares acted in full concert and for the accomplishment of the same result," for that the same is not supported by the evidence.

(i) For that the Court erred in making Finding of Fact No. 18, as follows:

"W. H. Elmore is illiterate, feeble in health and equally feeble in mentality, and both respondents had knowledge thereof," for that the same is not supported by the evidence.

(j) For that the Court erred in making Finding of Fact No. 19, as follows:

"That respondent Nye is a shrewd business man, of extraordinary mentality and dynamic energy and ingenuity; that although Elmore had on boots and was ditching when Meares arrived and, although he lived with his son nearby, Meares did not give him time to go home and change clothes but took him away with the promise to return him that night. As soon as Nye talked to him, Nye tried to get his lawyer, Mr. Timberlake, but he was out of town, and Nye then contacted him by long distance phone, making appointment to meet at the lawyer's office next morning at 8 A. M. In the meantime Nye and Meares arranged to keep Elmore in their presence until the next morning after the papers were executed, notwithstanding the fact that they knew Elmore had a son living in Lumberton. Nye had Meares and Elmore to sleep in his house that night", for that the same is not supported by the evidence.

[fol. 285] (k) For that the Court erred in making Finding of Fact No. 20, as follows:

"On the following morning, Nye took Elmore to Mr. Timberlake's office and told him that he (Elmore) wanted to drop his suit in federal court against B. C. Remedy Co., and that he (Nye) wanted it fixed up in a final way, so as to end it once and for all. My Nye told Attorney Timberlake he wanted Elmore discharged as administrator and the letters written," for that the same is not supported by the evidence, and the evidence shows that Nye's statements to Timberlake were only a repetition of Elmore's wishes which had been made known to Nye.

(l) For that the Court erred in making Finding of Fact No. 21 as follows:

"The writing of the letters and the filing of the final account were procured by respondent Nye for the express and definite purpose of preventing the prosecution of the civil action in the federal court and with intent to obstruct and to prevent the trial of the case on its merits in the federal court", for that the same is not supported by the evidence.

(m) For that the Court erred in making Finding of Fact No. 22, as follows:

"That the conduct of the respondents did obstruct and impede the due administration of justice in this cause; that the conduct has caused a long delay, several hearings



and enormous expense," for that the same is not supported by the evidence.

(n) For that the Court erred in making Finding of Fact No. 23, as follows:

"That respondent Meares did furnish liquor to Elmore and got him under his (Meares) control, but Elmore did [fol. 286] not remain intoxicated while he signed the letters and false final account; but he was completely under the control and domination of Meares and Nye; that neither of the respondents paid Elmore any sum or promised him any sum whatsoever, to get the case stopt", for that the same is not supported by the evidence insofar as it states that Meares did furnish liquor to Elmore and get him under his (Meares') control, and that he (Elmore) was completely under the control and domination of Meares and Nye.

3. That the Court erred in concluding that the conduct of the respondents is misbehavior so near to the presence of the Court as to obstruct the administration of justice and in adjudging them and each of them guilty of contempt and in ordering the Respondent Nye to pay the costs of the contempt proceedings, including the sum of \$500.00 to W. B. Guthrie, Attorney, "through whose untiring efforts and at great expense discovered and brought to the attention of the Court the contempt for its authority", and in directing respondent Nye also to pay a fine of \$500.00 and the respondent Meares to pay a fine of \$250.00 and in committing the respondents until compliance with the judgment or until otherwise discharged according to law.

4. That the Court was without jurisdiction of the subject matter of the inquiry and of the respondents and on account of the failure to institute said proceeding upon affidavit, duly made for the purpose of a contempt inquiry, and was without jurisdiction of the facts disclosed by the evidence.

5. That the entry of the judgment of voluntary non-suit on March 13, 1940, at the instance of the plaintiff, undermined the contempt proceeding which went with the dismissal of the main suit by this judgment of non-suit.

6. For that the Court erred in taxing as a part of the costs the witness fees in behalf of W. H. Elmore, who is a plaintiff, and a resident of South Carolina.

L. R. Varser & T. A. McNeill, by L. R. V., Counsel for Respondents.



[fol. 287] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed March 15, 1940

Notice is hereby given that R. H. Nye and L. C. Meares, respondents to a rule issued in contempt, hereby appeal to the Circuit Court of Appeals for the Fourth Circuit, from the judgment entered in this action on the 8th day of February, 1940.

Notice is hereby further given that the said R. H. Nye and L. C. Meares, respondents as aforesaid, do hereby also appeal to the Circuit Court of Appeals for the Fourth Circuit, from an order entered by the District Court of the United States for the Middle District of North Carolina, on the said 8th day of February, 1940, in this cause, which order is as follows:

“Among other witnesses who should be allowed to prove their attendance, the Court orders that W. H. Elmore, Henry Elmore and Dewey Howard, be allowed to prove their attendance from their homes near Conway, S. C., and the defendants except to the allowances on the ground that these witnesses came more than 125 miles to attend the Court and were not required to attend under subpoenas and also that W. H. Elmore is the plaintiff in the case. The Court, however, is of the opinion that the contempt proceeding is different from any ordinary civil action, and that the Court was entitled to have the testimony of these witnesses [fols. 288-295] in order that the Court might have the true facts necessary to determine whether or not any contempt did exist.”

L. R. Varser, Attorney for Appellant, R. H. Nye, Lumberton, North Carolina. T. A. McNeill, Attorney for Appellant, L. C. Meares, Lumberton, North Carolina.

[fol. 296] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE FOURTH CIRCUIT

No. 4640

R. H. NYE and L. C. MEARES, Appellants,

versus

UNITED STATES OF AMERICA, and W. B. GUTHRIE, Attorney,  
Appellees

In the Case of W. H. ELMORE, Administrator of James  
Elmore, Deceased,

vs.

C. T. COUNCIL and GERMAIN BERNARD, Trading as B-C  
Remedy Company

Appeal from the District Court of the United States for the  
Middle District of North Carolina, at Durham

DOCKET ENTRIES

April 20, 1940, the transcript of record is filed and the  
cause docketed.

April 26, 1940, the appearance of L. R. Varser is entered  
for the appellants.

Same day, the appearance of Wm. B. Guthrie is entered  
for W. B. Guthrie, Attorney, appellee.

Same day, motion of William B. Guthrie, appellee, to  
double the judgment of the District Court, is filed.

April 27, 1940, petition of Wm. B. Guthrie, attorney, ap-  
pellee, for leave to file typewritten brief as in a pauper  
appeal and to appear and argue the case when reached and  
called, is filed.

Order Permitting W. B. Guthrie, Attorney, to File Type-  
written Copies of Brief, etc.—Filed April 29, 1940

[Style of Court and Title Omitted]

On Consideration of the petition of W. B. Guthrie, At-  
torney, and for good cause shown,

It Is Ordered that the said W. B. Guthrie, Attorney, be,  
and he is hereby, permitted to file six (6) typewritten copies  
[fol. 297] of a brief and appendix in the above-entitled case,  
and to proceed herein without prepaying costs or giving of  
security therefor.

John J. Parker, Senior Circuit Judge.

April 27, 1940.

May 1, 1940, the appearance of Carlile W. Higgins, United States Attorney, and Bryce R. Holt, Assistant United States Attorney, is entered for the appellee United States of America.

May 4, 1940, the appearance of T. A. McNeill is entered for the appellants.

May 21, 1940, brief and appendix on behalf of the appellants are filed.

May 23, 1940, brief and appendix on behalf of the appellee W. B. Guthrie, Attorney, are filed.

May 24, 1940, motion of W. B. Guthrie to strike from the record judgment of voluntary non-suit and affidavit in support thereof are filed.

### Argument of Cause

July 2, 1940, (June term, 1940) cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 298] IN UNITED STATES CIRCUIT COURT OF APPEALS,  
FOURTH CIRCUIT

No. 4640

R. H. NYE and L. C. MEARES, Appellants,

versus

UNITED STATES OF AMERICA, and W. B. GUTHRIE, Attorney,  
Appellees

In the Case of W. H. ELMORE, Administrator of James  
Elmore, Deceased,

versus

C. T. COUNCIL and GERMAIN BERNARD, Trading as B-C  
Remedy Company,

Appeal from the District Court of the United States for the  
Middle District of North Carolina, at Durham

(Argued July 2, 1940. Decided August 30, 1940)

Before Parker, Soper and Dobie, Circuit Judges.

[fol. 299] L. R. Varser and T. A. McNeill (Varser, McIntyre & Henry on brief for Appellants, and William B. Guthrie (Guthrie & Guthrie on brief) for Appellee W. B. Guthrie.

## OPINION—Filed August 30, 1940

SOPER, Circuit Judge:

R. H. Nye and L. C. Meares (Mayers) appeal from a judgment of the District Court whereby they were adjudged guilty of contempt of court by reason of conduct tending to obstruct the administration of justice. The offense occurred in connection with a suit brought by W. H. Elmore, Administrator of the estate of James Elmore, deceased, against C. T. Council and Germain Bernard, trading as B-C Remedy Company, in which the administrator charged that the deceased came to his death through the consumption of a dangerous and poisonous headache powder manufactured by the defendants. The behavior of Nye and Meares was brought to the attention of the court, and the court having made due inquiry, ordered them to show cause why they should not be adjudged guilty of contempt, heard the evidence of both sides and entered the judgment appealed from. Thereby Nye was ordered to pay a fine of \$500 and costs of the proceeding, including the sum of \$500 to the plaintiff's attorney as compensation for his efforts and expenses incurred on the plaintiff's behalf in bringing the contemptuous conduct of the appellants to the attention of the court;\* and Meares was ordered to pay a fine of \$500.

The findings of the District Judge, amply supported by the evidence, disclosed in substance the following facts: On March 16, 1939, leave was granted to the administrator to [fol. 300] prosecute his suit against the Remedy Company in forma pauperis. W. B. Guthrie was appointed as attorney to represent him. On March 18, 1939 suit for wrongful death claiming damages in the sum of \$30,000 was brought. Answer was filed on April 29, 1939. Meanwhile, on April 19, 1939, Elmore, the administrator, mailed a letter addressed to the District Judge at Greensboro, North Carolina, requesting that the case be dismissed and enclosing a similar communication addressed to his attorney. This

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\* The imposition of a fine in a contempt proceeding in order to compensate the complainant is considered in *Carey Mfg. Co. v. Acme Mfg. Co.*, 2 Cir., 108 F. 873; *Kreplik v. Couch Patents Co.*, 1 Cir., 190 F. 565; *Merchant's S. & G. Co. v. Board of Trade of Chicago*, 8 Cir., 201 F. 20; *Oates v. United States*, 4 Cir., 233 F. 201.



effort to dismiss the suit was brought about improperly by Nye, with the cooperation of Meares. Nye's daughter had married the son of Council, one of the owners of the headache powder business; and Nye, being a shrewd business man of great energy and ingenuity, undertook to put an end to the Elmore suit.

To this end, he sent, Meares, his tenant, who was personally acquainted with Elmore, to Elmore's home near Conway, South Carolina, to bring Elmore by automobile to Nye's home at Lumberton, North Carolina. Elmore is an illiterate man, feeble in mind and body, and both appellants had knowledge of his condition. Meares found Elmore working in a ditch, plied him with liquor until he was under its influence, and then giving him no opportunity to go to his home nearby and change his clothes, took him to Lumberton under a promise to return him to his home that night. First they went to Nye's place of business when a conversation between him and Elmore took place. Nye then tried to get his lawyer, but failing, made an appointment for a conference at the lawyer's office the next morning. Elmore had a son living in Lumberton, but nevertheless he was taken to Nye's home where Elmore and Meares occupied the same room for the night. Drinking continued during the night.

The next morning Nye took Elmore to the lawyer's office who prepared the letters to the judge and to Elmore's attorney, and also prepared a final administration account to be filed in the Probate Court in North Carolina. For these [fol: 301] services Nye paid the lawyer's fee. Nye then took Elmore to the Probate Court, had him discharged as administrator and paid the clerk a fee of \$1. Nye then took Elmore to the post office, registered the letter to the judge and paid the postage.

Although Meares got Elmore under control by giving him intoxicating liquor, he was not under the influence of liquor when he signed the papers in the lawyer's office, nor was he promised or paid anything. Nevertheless he was at the time still completely under the control of Nye and Meares. Upon these facts the judge held that the conduct of Nye and Meares constituted misbehavior so near to the presence of the court as to obstruct and impede the due administration of justice, and accordingly found each of them guilty of contempt of court.

The federal statutes relating to contempt are codified in

28 U. S. C. A. §§385-390. It is provided in §385, insofar as it relates to the instant case, that the power to punish contempts "shall not be construed to extend to any cases except of misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice". The suggestion was made in the lower court that the acts charged against the appellants were not punishable by the District Court of the Middle District of North Carolina since they took place outside the boundaries of the District and beyond its jurisdiction. The position is not tenable and very properly was not insisted upon in this court. The quoted statutory phrase is not "to be spatially considered", *McCann v. New York Stock Exchange*, 2 Cir., 80 F. 2d 211, 213, cert. den. 299 U. S. 303. "The provision conferred no power not already granted, and imposed no limitation not already existing. In other words, it served but to plainly mark the boundaries of the existing authority". \* \* \* "The test, therefore, is the character of the acts done and its direct tendency to prevent and obstruct official duty". *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 418, [fol. 302] 419; *Myers v. United States*, 264 U. S. 95; see also *Sullivan v. United States*, 8 Cir., 4 F. 2d 100. Although the undue pressure exerted by the appellants upon Elmore took place at a distance from the court, it culminated in the letters addressed to the judge and Elmore's attorney directing the dismissal of the suit, and effectually interfered with the court in the performance of its functions. It is uniformly held that conduct attended by such a result takes place "so near" to the court as to obstruct the administration of justice. See 28 U. S. C. A. 385, n. 13.

The contention chiefly emphasized by the appellants is that the District Court was without jurisdiction to issue the order to show cause because it was based upon a petition and motion of Elmore's attorney which was not verified by affidavit. This contention is utterly without merit in this case, although it be assumed, as many courts hold, that an affidavit is a jurisdictional requirement in such a situation. The attorney's petition and motion were filed

Contempts are generally classified as direct and constructive, that is, those committed in the physical presence of the court and those committed without. At common law an affidavit was considered unnecessary in direct contempts because the court takes judicial notice of matters occurring

on September 20, 1939, unaccompanied by an affidavit; but such an affidavit was filed on October 7, 1939, no action having been taken by the appellants in the meantime. They first appeared in answer to the court's order on October 30, 1939, and then moved the court to strike out the order, not on the ground that the motion was not supported by affidavit, but on the ground that all of the actions complained of took place either in South Carolina or in the Eastern [fol. 303] District of North Carolina, and none of them took place in the Middle District of North Carolina where the Elmore suit was pending. These motions were overruled properly as has already been shown, and both parties offered testimony at the conclusion of which the judge took the matter under advisement until November 17. It was not until that date that the appellants moved to dismiss the proceeding because of the lack of an affidavit. Under these circumstances, it is obvious that the appellants waived the defect by their participation in the proceeding, even if it be supposed that the filing of an affidavit on October 7 was too late. See *Sona v. Aluminum Castings Co.*, 6 Cir., 214 F. 936; *In re Odum*, 133 N. C. 250; *In re Fletcher*, Apps. D. C., 107 F. 2d 666; 2 A. L. R. 236n.

Moreover, a complete answer to the contention resides in the fact that the judge's order to show cause was not issued until both Nye and Elmore had been subpoenaed and had testified on separate occasions as to the occurrences preceding the attempted dismissal of the suit, and the judge had satisfied himself that reasonable grounds existed for the charge of contempt of court. Indeed the contempt proceeding was precipitated by a motion of the defendants filed in the death case on August 29, 1939, to dismiss that action because the estate of the deceased had

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before it; but in constructive contempts, when the proceeding was instituted by a private person, an affidavit was generally considered necessary in order to give notice both to the court and to the alleged contemnor. *Rapalje on Contempts*, p. 121; *Blackstone, Commentaries*, 1807 Ed., Vol. 4, p. 286; *Sona v. Aluminum Castings Co.*, 6 Cir., 214 F. 936; 2 A. L. R. 225n. Cf. *Bowles v. United States*, 4 Cir., 50 F. 2d 848, 851; *In re Fletcher*, Ct. Apps. D. C., 107 F. 2d 666, in which it was held that an affidavit is not necessary in contempt proceedings under 28 U. S. C. A. §385, although prescribed by the statute in proceedings under §386.



been fully administered and Elmore, having been discharged as administrator, was no longer qualified to press the suit in that capacity. It was subsequent to this action that Elmore's attorney petitioned the court to cite the appellants for contempt and the proceedings leading to the judgment were taken. Manifestly the citation for contempt was not issued without proper foundation, and the charge was not prosecuted without due notice to the accused.

There can be no question that the District Judge was justified upon his finding of facts in concluding that the appellants' conduct amounted to contempt of court, in that they placed Elmore completely under their domination [fol. 304] and control and procured from him, while his will was subject to theirs, the letter designed to prevent the trial of the death case upon its merits. Many adjudications of contempt from improper interference with jurors, witnesses or officials of the court in the course of litigation are found in the books; and precedents are not lacking of contemptuous conduct that affected even more vitally the administration of justice by interfering with the litigants themselves in the prosecution of claims in courts of justice.

An example is found in the State of North Carolina itself in *Snow v. Hawks*, 183 N. C. 365, 111 S. E. 621, in which the plaintiff in a seduction suit was induced by threat of imprisonment by the father of the defendant to withdraw his suit. Threats of retaliation in case a plaintiff persisted in his suit were held contemptuous in *Wilson v. Irwin*, 144 Ky. 311, 138 S. W. 373; *Turk v. State*, 123 Ark. 341, 185 S. W. 472. In the latter case the court said: (123 Ark. 346)

"It is universally held that intimidating a witness and preventing his appearance at court or procuring him to absent himself from the trial, is a contempt of court. Preventing the appearance of a litigant in court, for the prosecution of a suit brought to enforce a right, by intimidation and threats, is such an obstruction of judicial procedure as renders absolutely worthless all process of the court, which is substituted for the enforcement and protection of the rights and redress and prevention of wrongs of the litigants. It destroys the dignity and power of the court and brings the administration of justice into disrepute."

See also, *Whittem v. State*, 36 Ind. 196; *Sharland v. Sharland*, 1 Times L. R. 492; *Bromilow v. Phillips*, (1892) 40



Week Rep. 220; *Smith v. Lakeman*, (1856) 26 L. J. Ch. NS 305; *Re Muloch*, (1864), 33 L. J. Prob. N. S. 205; *Webster v. Bakewell*, (1916), 85 L. J. Ch. N.S., 326.

No valid distinction in law exists between cases of this [fol. 305] sort, in which the litigant's freedom of action was obstructed by threats and physical compulsion, and the instant case of undue influence and pressure equally effective in restraining the litigant from the assertion of a valuable claim in a court of justice. The obstruction of the administration of justice which stigmatizes the act as contempt of court is found in all of them.

The record in the instant case shows that pending the appeal Elmore, administrator, as plaintiff in the death case, voluntarily submitted to a judgment of non suit. On this account the appellants say that he indicated that he did not wish to push his case any further, and hence there is no substance in the supposed invasion of his rights which the contempt proceedings were instituted to protect. The brief of the appellant, however, admits that the non suit may have been taken by Elmore in consideration of a payment to him; and in the argument it transpired that he was in fact paid a substantial sum for the dismissal of the case. The contention serves only to emphasize the propriety and necessity of the action taken by the District Court.

Affirmed.

[fol. 306] IN UNITED STATES CIRCUIT COURT OF APPEALS,  
FOURTH CIRCUIT

No. 4640

R. H. NYE AND L. C. MEARES, Appellants,

vs.

UNITED STATES OF AMERICA, AND W. B. GUTHRIE,  
Attorney, Appellees

In the Case of W. H. Elmore, Administrator of James Elmore, deceased, vs. G. T. Council and W. H. Bernard, trading as B-C Remedy Company

Appeal from the District Court of the United States for  
the Middle District of North Carolina

JUDGMENT—Filed and Entered August 30, 1940

This Cause came on to be heard on the transcript of the record from the District Court of the United States for

the Middle District of North Carolina, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

John J. Parker, Senior Circuit Judge; Morris A. Soper, U. S. Circuit Judge; Armistead M. Dobie, U. S. Circuit Judge. •

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RECITAL AS TO ISSUANCE OF MANDATE

On another day, to-wit, September 30, 1940, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Middle District of North Carolina, at Durham, in due form.

[fol. 307] October 9, 1940, motion of appellants for a recall of the mandate and stay of same pending application for writ of certiorari, is filed.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER RECALLING MANDATE, ETC.—Filed and Entered  
October 9, 1940

On Motion of the appellants, and for good cause shown,

It Is Ordered by the United States Court of Appeals for the Fourth Circuit, that the mandate of this Court, issued in this cause on September 30, 1940, be, and the same is hereby, recalled, and the Clerk of the District of North Carolina, is hereby directed to return said mandate to this Court forthwith, and

It Is Further Ordered that the re-issuance of the mandate be, and the same is hereby, stayed pending the application of the appellants in the Supreme Court of the United States for a writ of certiorari to this Court, provided said application is filed in the said Supreme Court within thirty (30) days from this date. October 9th, 1940.

John J. Parker, Senior Circuit Judge.

October 9, 1940, certified copy of order recalling mandate, etc. is transmitted, by mail, to the Clerk of the District

the District Court of the United States for the Middle District of North Carolina.

October 11, 1940, mandate is received from the Clerk of the District Court of the United States for the Middle District of North Carolina.

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[fol. 308] • Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 308-a] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 23, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[fol. 309] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF RECORD FOR USE ON WRIT OF CERTIORARI—Filed January 3, 1941

It Is Hereby Stipulated by and between counsel for the parties to the above entitled cause that the Clerk shall be required to print only the following portions of the certified transcript of record on file in this Court:

1. Typewritten transcript of record, pages 2-39, inclusive.
  2. Testimony of W. H. Elmore, stenographer's transcript, pages 17-67, inclusive.
  3. Testimony of Henry Elmore, stenographer's transcript, pages 68-72, inclusive.
  4. Testimony of D. J. Howard, stenographer's transcript, pages 73-78, inclusive.
  5. Stenographer's transcript, page 91, beginning with the words, "At This Point," and ending with the words, "respondent Mayers excepts."
- [fol. 310] 6. Testimony for respondents, stenographer's transcript, pages 92-229, inclusive.



7. Stenographer's transcript, page 230.
8. Typewritten transcript of record, pages 41-45, inclusive.
9. Typewritten transcript of record, pages 48-55, inclusive.
10. Typewritten transcript of record, pages 63-75, inclusive.

It is further stipulated that each of the parties to the above entitled cause shall have the right to refer in his or its briefs and oral argument to any portions of the certified typewritten transcript of record filed in this Court which are not contained in the record as printed pursuant to this stipulation, in the same manner as if the typewritten transcript had been printed in full.

L. R. Varser, O. L. Henry, Counsel for Petitioners;  
Francis Biddle, Solicitor General.

January 3, 1941.

[fol. 311] [File endorsement omitted.]

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Endorsed on cover: File No. 44,907, U. S. Circuit Court of Appeals, Fourth Circuit, Term No. 558. R. H. Nye and L. C. Mayers, Petitioners, vs. The United States of America and W. B. Guthrie. Petition for a writ of certiorari and exhibit thereto. Filed November 7, 1940. Term No. 558 O. T. 1940.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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No. 558

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R. H. NYE AND L. C. MAYERS,

*Petitioners,*

*vs.*

THE UNITED STATES OF AMERICA AND W. B.  
GUTHRIE.

---

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FOURTH CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF.

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✓  
J. BAYARD CLARK,  
T. A. McNEILL,  
O. L. HENRY,  
L. R. VARSER,  
*Counsel for Petitioners.*

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## INDEX.

### SUBJECT INDEX.

	Page
Petition for writ of certiorari .....	1
Statement of the case .....	2
Questions presented .....	2
Question 1 .....	2
2 .....	3
3 .....	3
Reasons relied on for the allowance of the writ ..	3
Supporting brief .....	7

### TABLE OF CASES CITED.

<i>Chetwood, Ex parte</i> , 165 U. S. 443 .....	7
<i>Probst, In re</i> , 205 Fed. 512 .....	3
<i>Sixth &amp; Wisconsin Tower, Inc., v. Aitkin</i> , 108 F. (2d) 538 .....	3
<i>Title Guaranty &amp; Surety Co. v. United States</i> , 222 U. S. 401 .....	7
<i>Warner v. New Orleans</i> , 176 U. S. 474 .....	7

### STATUTES CITED.

Judicial Code, Sec. 240, 28 U. S. C. A. 347 .....	7
Judicial Code, Sec. 268, 28 U. S. C. A. 385 .....	3

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1940**

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**No. 558**

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**R. H. NYE AND L. C. MAYERS,**

*Petitioners,*

*vs.*

**THE UNITED STATES OF AMERICA AND W. B.  
GUTHRIE.**

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FOURTH CIRCUIT.**

---

*To the Honorables, the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of the  
United States:*

Your petitioners, R. H. Nye and L. C. Mayers respectfully submit their petition for a writ of certiorari to review the decree of the United States Circuit Court of Appeals from the Fourth Circuit in the above entitled case (R. 174):

The Circuit Court of Appeals for the Fourth Circuit has affirmed on appeal a judgment of the District Court of the United States for the Middle District of North Carolina,

holding the respondents guilty in contempt, wherein petitioner Nye was fined \$500.00 and required to pay W. B. Guthrie, plaintiff's attorney, \$500.00 and taxed with the costs, and petitioner Mayers was fined \$250.00 (R. 6).

### **Statement of the Case.**

This contempt proceeding arose in the case of W. H. Elmore, Administrator of James Elmore, deceased, plaintiff, against C. T. Council and Germain Barnard, partners trading and doing business as the B-C Remedy Company, defendants, then pending in the Middle District of North Carolina, Durham Division.

On 29 September, 1939, the District Court was hearing a motion by defendants to dismiss this case. The cause alleged for dismissal was that the plaintiff had filed his final account as administrator of James Elmore, deceased, in the Clerk's office of the Superior Court of Robeson County, North Carolina, and had been discharged as such administrator, and on this hearing W. H. Elmore testified.

On 30 September, 1939, the District Court issued an order to show cause, reciting that the attorney for the plaintiff had moved the court to issue the order and that W. H. Elmore on oath testified to facts that the said R. H. Nye and L. C. Mayers (Meares) had been guilty of behavior contemptuous of the court (R. 8). The result of this hearing was a holding that the petitioners Nye and Mayers were guilty of contempt (R. 6).

Respondents appealed to the Circuit Court of Appeals for the Fourth Circuit, which affirmed the judgment of the District Court on 30 August, 1940. The opinion of the court was by Soper, Circuit Judge. Circuit Judges Parker and Dobie agreed (R. 168).

### **Questions Presented.**

1. Was this contempt proceeding properly constituted without an affidavit made for the purpose of supporting the



order to show cause, and did the court have jurisdiction thereof?

2. Were the respondents guilty of contempt?

3. Did the judgment of non-suit rendered herein by consent of plaintiff on the 13th day of March, 1940, undermine and render the judgment against respondents in contempt, void?

#### **Reasons for Allowance of the Writ.**

1. The Circuit Court of Appeals has rendered a decision in this matter which conflicts with other decisions of Circuit Courts of Appeals, including interpretations of decisions of this Court. The District Court treated this as civil contempt under Judicial Code, Section 268, Title 28, U. S. C. A. Section 385, while the Circuit Court of Appeals considered the matter as coming under 28 U. S. C. A., paragraphs 385-390. This question is most important to the public, to the courts and to the parties, and involves a construction of the power and jurisdiction of Federal District Courts to punish for contempt, including the application of the limitation prohibiting the extension of the power to punish for contempt set forth in so much of Section 268, Judicial Code, as was embraced in the Act March 2, 1831. The decision of the Circuit Court of Appeals in this case is in apparent conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit in "In Re Sixth & Wisconsin Tower, Inc. Dufenhorst v. Aitkin, et al.", 108 F. (2d) 538, in which case the Seventh Circuit Court of Appeals followed the Second Circuit Court of Appeals in "In Re Probst, 205 Fed. 512, 513" and by these it appears that the Second and Seventh Circuit Courts of Appeal have applied a restricted construction to Judicial Code Section 268, and the Fourth Circuit Court of Appeals has applied a liberal con-

struction greatly extending the power to punish for contempt beyond that exercised in these other two circuits.

It is very important, indeed, to the public that it be determined finally whether an affidavit is necessary to support an order to show cause in contempt, according to the common law rule applicable in all the States except where changed by statute or constitutional enactment. In the Fourth Circuit it seems to be unnecessary for an affidavit to be filed on which to issue the order to show cause. With much respect, the respondents contend that they did not waive this requirement and that the affidavit filed a week after the order to show cause was not sufficient.

Another reason presented by the petitioners is that since this proceeding must needs be for civil contempt in order to aid one of the parties that an action must be pending in the District Court at all times, throughout the period of appeal to the Circuit Court of Appeals, a pending cause in the District Court, and that the voluntary non-suit taken by the plaintiff in March, 1940, pending the appeal in the Circuit Court of Appeals in the contempt matter, deprived the contempt proceeding of any sufficient support. If the plaintiff settled his case upon satisfactory terms and was paid therefor, his rights had not suffered on account of the matters in the contempt proceeding and if he, for any other reason, took a non-suit, this expressed his satisfaction with a cessation of the main action.

All of these questions are important. In fact, any exercise of the power to punish for contempt is a serious question, and when the powers of the Court and the rights of the parties and the method of proceedings are not definitely settled, serious rights may be jeopardized.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fourth Circuit, com-

manding said Court to certify and to send to this Court a full and complete transcript of the record and of the proceedings in said Circuit Court of Appeals had in said matter, to the end that this cause may be reviewed and determined by this Honorable Court, as provided by the statutes of the United States and the rules of this Court, and that the judgment herein of the said Circuit Court of Appeals be reversed by this Honorable Court, and for such further relief as to the Court may seem proper.

J. BAYARD CLARK,

T. A. McNEILL,

O. L. HENRY,

D. R. VARSEY,

*Attorneys for R. H. Nye and  
L. C. Mayers, Petitioners.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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**No. 558**

---

R. H. NYE AND L. C. MAYERS,

*Petitioners,*

*vs.*

THE UNITED STATES OF AMERICA AND W. B.  
GUTHRIE.

---

**SUPPORTING BRIEF OF PETITIONERS ON WRIT OF  
CERTIORARI.**

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This Court has jurisdiction. It is provided in Judicial Code, Section 240, as amended, 28 U. S. C. A. Section 347, that any judgment of a Circuit Court of Appeals may be reviewed by this Court only upon writ of certiorari and this section gives this Court jurisdiction to grant the writ of certiorari and to make a complete review of the decision of the Circuit Court of Appeals of the Fourth Circuit.

The power determining what cases shall be brought up is vested in the Supreme Court, and this power is not limited.

*Ex parte Chetwood*, 165 U. S., 443;

*Warner v. New Orleans*, 176 U. S., 474;

*Title Guaranty & Surety Co. v. U. S.*, 222 U. S. 401.

While the petitioners recognize that the granting of writs of certiorari is within the judicial discretion of this Court, the petitioners contend that the questions involved are of sufficient importance and that there is no doubt of the jurisdiction to grant the writ.

Respectfully submitted,

J. BAYARD CLARK,

T. A. McNEILL,

O. L. HENRY,

L. R. VARSEY,

*Attorneys for R. H. Nye and  
L. C. Mayers, Petitioners.*

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**SUPREME COURT OF THE UNITED**

**STATES**

**OCTOBER TERM, 1940**

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**No. 558**

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**R. H. NYE AND L. C. MAYERS,**

*Petitioners,*

*vs.*

**THE UNITED STATES OF AMERICA AND W. B.  
GUTHRIE.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE FOURTH CIRCUIT.**

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**BRIEF FOR PETITIONERS.**

---

**J. BAYARD CLARK,**

**L. R. VARSER,**

**R. A. MCINTYRE,**

**O. L. HENRY,**

*Counsel for Petitioners.*

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## CONTENTS.

	Page
Opinion below .....	1
Jurisdiction .....	1
Concise statement of case .....	2
Specification of errors assigned .....	10
Summary of argument .....	10
Argument .....	11
(a) .....	10
Point 1 .....	10
Point 1 presents petitioners' contention that the contempt proceeding was not properly constituted without an affidavit made for the purpose of supporting the order to show cause and that the Court did not have jurisdiction ..	10
(b) .....	10
Point 2 .....	10
Point 2 presents petitioners' contention that they were not guilty of contempt in respect to misbehavior so near to the presence of the Court as to obstruct the administration of justice ...	14
(c) .....	10
Point 3 .....	11
Point 3 presents petitioners' contention that the non-suit rendered 13 March, 1940, undermined the judgment against respondents for contempt and left no support for it to rest upon ..	22

### TABLE OF CASES CITED.

<i>Bessette v. W. B. Conkey Co.</i> , 194 U. S., 324, 24 Sup. Ct., 665, 48 L. Ed. 997 .....	17
<i>Charles Cushman Co. v. Mackesy</i> (Maine), 200 Atl. 505, 118 A. L. R. 148 .....	13
<i>Chetwood, Ex Parte</i> , 165 U. S. 443 .....	2
<i>City of Clearwater, Florida, v. Beers</i> , 90 F. (2d) 80, 82 .....	23
<i>Colter, In re</i> , 35 Wash. 526, 65 Pac. 759 .....	13
<i>Cuiler v. Atlantic R. Co.</i> , 131 Fed. 97 (4th Circuit) ..	15

	Page
<i>Deaton, In re</i> , 105 N. C. 59, 64	12
<i>Eustace v. Lynch</i> , 80 F. (2d) 656	23
<i>Foster, Ex parte</i> , 44 Tex. Crim. Rep. 423, 60 L. R. A. 631, 71 S. W. 593	13
<i>Fox, In re</i> , 3 Cir., 96 F. (2d) 23	17
<i>Gompers v. Buck's Stove &amp; Range Co.</i> , 221 U. S. 418, 31 Sup. Ct. St. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874	14
<i>He teen, Ex parte</i> , 29 Nev. 352, 90 Pac. 737, 13 Ann. Cass. 1173	13
<i>Hillmon v. Mutual L. Ins. Co.</i> , 79 Fed. 749	14
<i>Hotaling v. Superior Court</i> , 217 Pac. 73 (Cal.) 29 A. L. R. 126	14
<i>Kreplik v. Couch Patents Co.</i> , 190 Fed. 565, 111 C. C. A. 381	15
<i>Laundry, Ex parte</i> , 65 Tex. Criminal Rep. 440, 144 S. W. 962	13
<i>Leman v. Krentler-Arnold Hinge Last Co.</i> , 284 U. S. 448	23
<i>McCann v. New York Exchange</i> , 80 F. (2d) 211	17
<i>McCarty, In re</i> , 154 Cal. 534, 98 Pac. 540	13
<i>McKenna, In re</i> , 47 Kans. 738, 38 Pac. 1076-1078	13
<i>Morgan v. United States</i> , 95 F. (2d) 830	15
<i>Nickell, In re</i> , 47 Kans. 734	13
<i>Perry v. Kausz</i> , 167 Ill. App. 250	13
<i>Sixth &amp; Wisconsin Tower, Inc., In re</i> , 108 F. (2d) 538, 540 (C. C. A. 7)	16
<i>Sona Aluminum Castings Co.</i> , 131 C. C. A. 232, 214 Fed. 326	12
<i>State v. Blackwell</i> , 10 S. C. 35	13
<i>State v. Thompson</i> , 2 Ohio Dec. Reprint 30	13
<i>State ex rel Gammell v. Clancy</i> , 24 Mont. 359, 71 Pac. 987	13
<i>State ex rel. Flynn v. District Ct.</i> , 33 Mont. 115, 82 Pac. 450	13
<i>Staley v. South Jersey Realty Co.</i> , 83 N. J. Eq. 300, 90 Atl. 1042, 40 Am. English Ann. Cass. 1916-B 955	13
<i>State v. Reynolds</i> , 204 Fed. 709, 123 C. C. A. 13	14
<i>State v. Nathans</i> , 49 S. C. 207	23



# INDEX

iii

Page

<i>Terminal R. R. Ass'n v. United States</i> , 266 U. S. 16, 45 Sup. Ct. 665, 48 L. Ed. 997.....	17
<i>Title Guaranty and Surety Co. v. U. S.</i> , 222 U. S. 401.....	2
<i>United States v. Toledo Newspaper Co.</i> , 237 Fed. 986, 150 C. C. A. 381.....	15
<i>United States v. Gruikshank, et al.</i> , 92 U. S. 542, 569, 23 L. Ed. 588, 593.....	17
<i>Warner v. New Orleans</i> , 176 U. S. 474.....	2
<i>Ward v. Arenson</i> , 10 Bosw. (N. Y.) 589.....	13
<i>West Jersey Traction Co. v. Camden</i> , 58 N. J. L. 362, 33 Atl. 966.....	13
<i>Whittim v. State</i> , 36 Inc. 196.....	13
<i>Worden v. Searis</i> , 121 U. S. 27, 10 L. Ed. 858.....	23
<i>York v. State</i> , 89 Ark. 72, 116 S. W. 948.....	13

## STATUTES CITED.

Judicial Code, Sec. 240 (28 U. S. C. A. 347).....	1
Judicial Code, Sec. 268 (28 U. S. C. A. 385).....	2
U. S. C. A., Title 28, Sec. 350.....	2

## TEXTS CITED.

2 A. L. R. 225.....	12
Blackstone's Commentaries, 1807 Ed., Vol. 4, p. 286.....	13

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1940**

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**No. 558**

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**R. H. NYE AND L. C. MAYERS,**  
*Petitioners,*  
*vs.*

**THE UNITED STATES OF AMERICA AND W. B.  
GUTHRIE.**

---

**CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH  
CIRCUIT**

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**BRIEF FOR PETITIONERS.**

**Opinion Below.**

The opinion of the Circuit Court of Appeals for the Fourth Circuit in this case (R. 168-174) reported in 113 F. (2) 1006. There was no opinion in the trial court filed other than the findings of fact and judgment (R. 153).

**Jurisdiction.**

This Court has plenary jurisdiction to review upon writ of certiorari any judgment of the Circuit Court of Appeals and to make a complete review of such decision.

*Judicial Code*, Section 240, 28 U. S. C. A., Section 347.

The jurisdiction of this Court to determine what cases shall be reviewed on certiorari is plainly given and the power is not limited.

*Ex Parte Chetwood*, 165 U. S. 443;

*Warner v. New Orleans*, 176 U. S. 474;

*Title Guaranty and Surety Co. v. U. S.*, 222 U. S. 401.

The contempt of which the plaintiffs were convicted, if contempt at all, must be civil contempt. There is no allegation or suggestion of a commission of a crime, or an affront to the court in session or any interference with its functioning, in the evidence or findings (R. 153).

From the entire record it appears that this matter has been treated as a civil contempt arising in the main suit. The petition for the writ of certiorari was timely (Sec. 8 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940; U. S. C. Title 28, Sec. 350).

The petition was filed November 7, 1940. It is clearly within ninety days from August 30, 1940, when the Circuit Court of Appeals entered its judgment and handed down its opinion (R. 168-174).

### **Concise Statement of Case.**

Petitioners, respondents in the District Court, appellants in the Circuit Court of Appeals, were cited to appear by an order to show cause why they should not be attached for contempt. This order recites that the attorney for the plaintiff had moved the court and that W. H. Elmore had testified, "to facts that the said R. H. Nye and L. C. Mayers had been guilty of misbehavior contemptuous of this Court." The trial court proceeded under Judicial Code, Section 268, U. S. C. A. 385. A trial was had and the petitioners were convicted of contempt and fined, as follows: R. H. Nye \$500.00 fine, and \$500.00 required to be paid to W. B. Guthrie, attorney, and costs, and Mayers a fine of \$250.00 (R. 158).



Petitioners raised the questions presented by appropriate motions to dismiss the order to show cause (R. 13-16), and reserving these exceptions to a denial of the same, filed answers under oath (R. 17-20), denying that they were guilty of contempt and stating that petitioners had no intention to reflect upon the court to obstruct its processes or to interfere therewith (R. 20-24), and exceptions were made to the denial and respondents' motions to dismiss and to dismiss at the close of all the evidence (R. 16). The court reserved its decision and continued all matters until November 17, 1939. From the judgment entered an appeal was had to the Circuit Court of Appeals for the Fourth Circuit (R. 165), and this Court affirmed the judgment to the District Court (R. 168-173). The petition for certiorari was granted by this Court (R. 175).

This contempt proceeding was initiated by plaintiff's attorney, Guthrie, charging in his motion (R. 9-12) that the petitioners' conduct had caused the plaintiff Elmore to file a final account and to ask for the dismissal of his suit when he did not know what he was doing. Guthrie's motion was in right of Elmore plaintiff and to protect an alleged threatened invasion of plaintiff Elmore's rights in which Guthrie was rendering service. Petitioners contend that a civil contempt cannot be based upon that portion of Judicial Code 268 U. S. C. A., Section 385 which relates to misbehavior "so near thereto as to obstruct the administration of justice."

W. H. Elmore, Administrator of James Elmore, deceased, sued the B. C. Remedy Company, a partnership consisting of C. T. Council and Germain Bernard, in the District Court, at Durham, North Carolina, for damages on account of the wrongful death of James Elmore, his intestate (R. 1-4). The plaintiff alleged that the death of his intestate was caused by the defendants in putting upon the market a certain headache remedy to which his intestate

had become addicted to such an extent that he died therefrom. The jurisdiction of the District Court was based on diversity of citizenship. Plaintiff resided in South Carolina, but had qualified as administrator of his intestate in Robeson County, North Carolina. This action matured and later the defendants filed a motion to dismiss (R. 7), alleging that plaintiff had filed his final account as administrator of his intestate in the Superior Court of Robeson County, North Carolina, and had been discharged from his trust and was thereby unable longer to prosecute his suit.

A hearing was had on this motion in the District Court September 29, 1939. W. H. Elmore (R. 7-8) in substance then testified that Mayers at the instance of Nye, came to him in South Carolina and gave him liquor and told him Nye wanted him, Elmore, to come to Lumberton, and that Mayers had come for him, and Nye wanted to see him, Elmore, "about the case I had in the Federal Court against B. C. Remedy Company". "He got me intoxicated and persuaded me to go with him to Lumberton right then" (R. 7). Elmore further testified that he had no opportunity to consult his lawyer and that Nye told him there was nothing in the case (referring to the suit against B. C. Remedy Company), that Lawyer Carlyle, a good lawyer, said there was nothing to it and that Nye's daughter had married a son of the defendant Council and that Nye was anxious to get the case stopped. Elmore further testified that he was kept full of liquor through the night and that next day the papers about Elmore's final account as administrator were fixed up by Nye's lawyer and that he did not have a chance to communicate with his lawyer and all this was done while I was drunk (R. 31, 49). Elmore further testified that he had no education; that his occupation was a cottonmill hand and he did not want the case stopped, but wanted it tried (R. 8).

The testimony above set forth is that referred to in the order to show cause (R. 8).

The petitioners filed motions to dismiss (R. 9, 10, 11, 12).

These motions challenge the jurisdiction of the Court on the ground that the petitioners were residents of Robeson County, North Carolina in the Eastern District, and that none of the matters alleged happened in the Middle District, and related to matters concerning the probate of Robeson County, North Carolina solely, and by amendment challenging the sufficiency of the motion filed September 30, 1939, on the ground that it was not verified. This amendment to these motions was filed November 17, 1939 (R. 35), a date to which the Court had continued the hearing (R. 37). On October 30, 1939 (R. 16), which was the return day of the order to show cause, the trial court denied defendants' motions and was of opinion that the question to be determined was whether the respondents, or either of them, are guilty of misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice and this is a matter of fact to be determined by the evidence and not on motion. The respondents at the close of the evidence moved to dismiss, and these motions were denied, and exceptions reserved (R. 16).

The answers of the petitioners denied the allegations set forth in the motion filed by the plaintiff's attorney (R. 17-20) and set forth their version of the transaction in substance as follows:

Petitioner Nye says that Elmore appeared at his office where he was, near Lumberton, when he was busy and that Mayers was with Elmore. When Nye saw Elmore he appeared to be normal and not under the influence of liquor. That Elmore stated that he had moved to South Carolina and was living with his daughter. Nye already knew that Elmore for several years had lived near the National Cot-

ton Mill settlement, not far from Nye's place of business. That Elmore stated that he was in bad health and did not desire to be troubled with a law suit in the Federal Court, at Durham, and wanted to get rid of the suit and the administration, and asked Nye to help him; that Nye told him he did not know what to do about such matters and at that time of day he did not think he could get the lawyer who usually attended to Nye's matters, but called and found this lawyer was out of town; that Elmore was anxious to return to South Carolina, but waited until next morning; that Elmore did not want to stay at the hotel or at Mayers' home and Nye offered to let Mayers and Elmore occupy a room at his home in Lumberton. That Nye was not taking his meals at home at that time and advised Mayers and Elmore that he would be away from home until late at night and would probably leave in the morning before they got up, but they could take meals at Nye's expense, at his brother's place, and that he did not see either Mayers or Elmore until next morning he found them at breakfast there. That Nye went with Elmore to a lawyer's and stated to his lawyer Timberlake, in the presence of Elmore, the request that Elmore had made the previous evening; that Timberlake then talked with Elmore and determined what should be done and that the respondent Nye had nothing to do further with the matters until he went to the office of the Clerk of the Superior Court of Robeson County with Elmore and said nothing to Elmore whatever, but did pay \$1.00 costs when the Clerk requested Elmore to pay it and he did not have the money and that he thereafter left the Clerk's office with Elmore, saw nothing more of him after advising Mayers, who took Elmore home. Nye alleges that he did not give Elmore, directly or indirectly, any liquor and was without knowledge that anybody else had given him any liquor and that he had no knowledge



or suspicion that Elmore was not in his right mind and normal and that he made no inducements to Elmore in the matter whatever. Nye admitted that his daughter married a son of one of the defendants in the main suit, but says he never discussed the matter with his son-in-law, or with either of the defendants, and no request had been made by either of them concerning this matter and that he was merely attempting to aid his friend Elmore who asked him about getting clear of the suit and his administration.

Nye says that petitioner Mayers is a tenant on his farm and that he did not send Mayers after Elmore, or bear any expense of his trip, and that he did not give him any liquor or pay for any. Nye further says that the only thing he ever said in respect to Elmore in Mayers' presence was several weeks before Elmore appeared at his office that Elmore had instituted a suit against the B. C. Remedy folks and that since his daughter had married the son of one of the parties, he would be glad if Elmore would dispose of the suit and not trouble them any more and that Mayers said that he knew Elmore and if he had an opportunity to do so he would speak to him about it. Nye further says that he did not intend to interfere with the court or have anything to do with it, and that the papers filed were in the probate court of Robeson County, which had full jurisdiction over such matters and that at no time did he intend to interfere with, or have in mind any disrespect for or interference with the District Court, at Durham.

Mayers says in substance (R. 18-22) that he had a conversation with Nye, as stated in Nye's answer, and that he wanted to see Elmore about some timber in Elmore's then community, and that he would speak to Elmore about the case. That on April 18th he went to South Carolina and found Elmore in a field at work and after inquiring about the timber Elmore spoke about the law suit, said he was much worried about it—had given him concern and trouble

and that he was unable physically and financially to attend to it at such a distance and wanted to drop it, and that a Mr. Carlyle, a lawyer in Lumberton, had advised him about it with reference to the strength of the case, and that he worried about it and that Mayers then told Elmore, who knew Nye, that he had talked with Nye and that Nye was interested in it because his daughter had married into the family which was connected with the B. C. Company and that Elmore requested respondent to take him to Lumberton, and he did so, and carried Elmore to the office of Nye, at Lumberton, and there he learned that the matter could not be attended to on that date, because a lawyer could not be had that night; whereupon, it was agreed that Mayers and Elmore should spend the night at Nye's home and the matters should be transacted the following morning and that he did spend the night with Elmore at Nye's home and had breakfast with Elmore at a cafe operated by Nye's brother and that Elmore left with R. H. Nye after breakfast and met him at a garage according to appointment. Mayers further stated (R. 93) that he did not know anything about court procedure, or what Elmore and Nye had in view with reference to the law suit until after Elmore had started back to South Carolina with him, when Elmore said he had got rid of the case and was glad of it, that it had been worrying him for a long time. Mayers said he did not drink any whiskey with Elmore or in his presence, and did not give Elmore any liquor, and that Elmore drank no liquor while in his presence and that he had nothing to do with Elmore's acts with reference to the law suit. That what he did was result of his friendship for R. H. Nye and did not intend to interfere with the District Court and he says that the Clerk of the Superior Court of Robeson County has full probate jurisdiction, including the administration of estates.

The petitioners were permitted November 17, 1939, to file an amendment to their motions, expressly setting up that the motion filed September 30, 1939, by plaintiff's attorney (R. 9) was unverified and not sufficient to give jurisdiction to issue the order to show cause. Motions had already been filed on 30 October, 1939 (R. 9-10), challenging the jurisdiction of the probate court to proceed on the order to show cause.

These motions by respondents, petitioners here, to dismiss the rule to show cause (R. 12-13) were all denied with appropriate exceptions reserved, as well as motions to dismiss at the close of all the evidence, and the specification that the motion was unverified was permitted as a part of the original motions.

The petitioners have always contended that an affidavit is a necessity for the issuance of the order to show cause and that such affidavit must be made for this purpose and not for some other purpose.

Petitioners have always contended that they were not guilty on the facts and that the evidence of the witnesses Elmore were totally insufficient to support a conviction for contempt and that the evidence submitted by the witnesses for the petitioners presented facts greatly demonstrating that petitioners were not guilty of misbehavior so near to the presence of the court as to interfere with the administration of justice therein.

Petitioners also contended that there was no primary basis for the contempt proceeding to stand upon after March 13, 1940, when plaintiff Elmore, Administrator, submitted to a voluntary nonsuit which was entered by the District Court. The contempt proceeding was treated by the trial court as in and a part of the suit for damages for wrongful death and was styled accordingly with its title, although based upon Judicial Code, Section 268, U. S. C. A. 385, under the clause "so near thereto", as to constitute an

obstruction to the administration of justice in the District Court and since the contempt was in aid of the plaintiff Elmore administrator that such plaintiff had the right and power when approved by the court to dismiss his suit for damages and end the whole proceeding and that he did so and such action did end the contempt proceeding.

### **Specification of Errors Assigned.**

1. WAS THIS CONTEMPT PROCEEDING PROPERLY CONSTITUTED WITHOUT AN AFFIDAVIT MADE FOR THE PURPOSE OF SUPPORTING THE ORDER TO SHOW CAUSE, AND DID THE COURT HAVE JURISDICTION THEREOF?

2. WERE THE RESPONDENTS GUILTY OF CONTEMPT?

3. DID THE JUDGMENT OF NON-SUIT RENDERED HEREIN BY CONSENT OF PLAINTIFF ON 13 MARCH, 1940, UNDERMINE AND RENDER THE JUDGMENT AGAINST RESPONDENTS IN CONTEMPT, VOID?

### **Summary of Argument.**

Petitioners summarize their contentions as follows:

1. That the contempt proceeding in the District Court was not properly constituted without an affidavit made for the purpose of supporting the order to show cause and that this affidavit is a jurisdictional requirement and the failure to have such supporting affidavit deprived the court of jurisdiction to proceed for contempt. The alleged misbehavior did not occur in the presence of the court and petitioners contend that it did not occur "so near thereto" as to obstruct the administration of justice.

2. The respondents contend that they were not guilty of contempt and that the transaction had with the plaintiff Elmore was a private matter cognizable only, if at all, in a proper suit between the parties and insofar as it affected the status of Elmore as administrator and his right to continue the suit for damages, such matters belong to the pro-



bate court in which Elmore, administrator, qualified; and in the District Court as to whether he could lawfully maintain his suit for damages. Petitioners further contend that the facts as shown by the testimony of all the witnesses is not such as to support a conviction for contempt.

3. Petitioners contend further that plaintiff Elmore, Administrator, suffered a voluntary non-suit on 13 March, 1940, and that such judgment ended the primary action, to-wit, "W. H. Elmore, Administrator of James Elmore, deceased vs. Council and Bernard, trading as B. C. Remedy Company," and, therefore, there was nothing after such non-suit upon which the contempt proceeding could be supported. This proceeding has at all times been treated by the District Court as a civil contempt. It fashioned its order to show cause and its findings of fact and judgment by adopting the title in the suit for damages, and the District Court proceeded with it as a matter in that primary suit and, therefore, the contempt proceeding was undermined and left without support.

### ARGUMENT.

1. Was this contempt proceeding properly constituted without an affidavit made for the purpose of supporting the order to show cause, and did the court have jurisdiction thereof?

Point 1 (R. 159).

Point 3 (R. 164).

Point 4 (R. 164).

This proceeding against Nye and Mayers seeks to present a case of constructive or indirect civil contempt. There is nothing that savors of criminal contempt in the findings (R. 1-6) or in the evidence. Plaintiff Elmore contended that his rights were invaded because the respondents pro-

cured him, while under the influence of liquor and by use of undue influence, to execute papers that he did not desire to execute. These papers were to be, and were, filed in the Superior Court of Robeson County, North Carolina, and upon their face called for a discharge of the plaintiff Elmore as Administrator of James Elmore, and all the transactions referred to in all the conventions took place in Lumberton, Robeson County, North Carolina, in the Eastern District, some 115 miles by the usual route of travel from Durham, where the suit for wrongful death was pending in the District Court for the Middle District of North Carolina. So much of the evidence as relates to transactions in South Carolina were some 100 miles farther away. There is no evidence in the record that the District Court was in session at Durham at that time or that the District Court knew of the facts disclosed in the testimony until September 29, 1939, when it was hearing a motion to dismiss the damage suit. Finding 12 (R. 153).

The court had no personal knowledge of the matters shown in the evidence and, therefore, it was necessary that the facts be set forth in an affidavit before the court in order to give the court jurisdiction to issue the order to show cause, and this rule seems to be uniformly recognized.

2 A. L. R. 225;

*In Re Deaton*, 105 N. C. 59, 64;

*Sona Aluminum Castings Co.*, 131 C. C. A. 232, 214 Fed. 326.

This latter case states: "Process of arrest for contempt not committed in the Court's presence can properly issue only upon the filing of affidavit stating positively the facts and in such a way as prima facie to show the commission of a contempt. This is the generally recognized rule."

The District Court evidently had this rule in mind in issuing the order to show cause, for it recited (R. 8), "And it

appearing to the Court that W. H. Elmore, on oath, testified to facts that the said R. H. Nye and L. C. Mayers have been guilty of behavior contemptuous of this Court."

The testimony of Elmore (R. 165) was given on September 29th on an entirely different matter, to-wit, the defendants' motion to dismiss the suit for wrongful death, and was not given for the purpose of initiating a contempt proceeding.

*State v. Blackwell*, 10 S. C. 35;

*Whittim v. State*, 36 Ind. 196;

*In Re Nickell*, 47 Kans. 734;

*In Re McKenna*, 47 Kans. 738, 28 Pac. 1076-1078;

*Ex Parte Laundry*, 65 Tex. Criminal Rep. 440, 144 S. W. 962;

*In Re Colter*, 35 Wash. 526, 65 Pac. 759;

*Ward v. Arenson*, 10 Bosw. (N. Y. 589);

*Perry v. Kausz*, 167 Ill. App. 250;

*In Re McCarty*, 154 Cal. 534, 98 Pac. 540;

*Ex Parte Hedeem*, 29 Nev. 352, 90 Pac. 737, 13 Ann. Cass. 1173;

*State v. Thompson*, 2 Ohio Dec. Reprint 30;

*Ex Parte Foster*, 44 Tex. Crim. Rep. 423, 60 L. R. A. 631, 71 S. W. 593;

*York v. State*, 89 Ark. 72, 116 S. W. 948;

*State ex rel. Gammell v. Clancy*, 24 Mont. 359, 61 Pac. 987;

*State ex rel. Flynn v. District Ct.*, 33 Mont. 115, 82 Pac. 450;

*Charles Cushman Co. v. Mackesy* (Maine), 200 Atl. 505, 118 A. L. R. 148;

Blackstone's Commentaries, 1807 Ed. Vol. 4, 286;

*Staley v. South Jersey Realty Co.*, 83 N. J. Eq. 300, 90

Atl. 1042, 40 Am. English Ann. Cass. 1916-B, 955;

*West Jersey Traction Co. v. Camden*, 58 N. J. L. 362, 33 Atl. 966;

*Hotaling v. Superior Court*, 217 Pac. 73 (Cal.), 29 A. L. R. 127;

*State v. Reynolds*, 204 Fed. 709, 123 C. C. A. 13;

*Hillmon v. Mutual L. Ins. Co.*, 79 Fed. 749;

*Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 31 S. St. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

The petitioners contend that it was necessary that an affidavit showing contempt should be filed as a basis for the order to show cause and that the testimony of Elmore taken on another motion and the unverified motion of Elmore's counsel, were insufficient to comply with this rule and that such testimony and motion did not disclose facts giving the court jurisdiction to proceed as it did proceed in constructive civil contempt.

**2. Were the respondents (petitioners here) guilty of contempt?**

This question involves, first, the power of the District Court to proceed in the original cause, wherein Elmore, Administrator, was plaintiff, against the B. C. Remedy Company in the manner used, wherein the District Court sought to determine the guilt of the petitioners under Judicial Code, Section 268, U. S. C. A. 385. This Act, approved 24 September 1789, contained only the following: "This Court shall have power to impose and administer all necessary oaths and to punish by fine or imprisonment, at the discretion of the Court, contempts of their authority."

Thereafter much controversy arose with respect to the exercise of this power by the Federal judiciary, and one phase of this controversy resulted in the impeachment by the House of Representatives of a District Judge of Pennsylvania. This District Judge was acquitted in the impeachment proceeding, but out of it grew the amendment approved March 2, 1831, to-wit: "Such power to punish,



contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice \* \* \*."

The remainder of this section applies to officers of the courts and official transactions, including disobedience or resistance by such officers, jurors or witnesses, or other persons, to writs, process, orders, rules, decrees and commands of the Court, and is not involved in this case.

The Court below attempted to proceed upon the clause, "So near thereto as to obstruct the administration of justice."

It is generally conceded that the power of Congress is plenary in respect to statutory courts which it establishes, and that included in the term "the said courts" is the District Court. The amendment, approved March 2, 1831, containing the clause, "So near thereto" is, necessarily, a limitation.

*Cuiler v. Atlantic R. Co.*, 131 Fed. 97 (4th Circuit).

*U. S. v. Toledo Newspaper Co.*, 237 Fed. 986, 150 C. C. A. 636, 247 U. S., 402, 62 L. Ed. 1186.

*Kreplik v. Couch Patents Co.*, 190 Fed. 565, 111 C. C. A. 381.

*Morgan v. U. S.*, 95 Fed. (2) 830.

It is clear that nothing was done in the presence of the District Court, and the Court relies upon in its judgment, the words, "So near thereto" (R. 158).

The constructions of the words, "So near thereto" present an interesting contrariety of the opinion in the lower courts. The conduct alleged against the petitioners cannot be construed as an affront to, or interference with, the Court in its functions. In fact, the Court in its judgment (R. 153) says, referring to its direction that the petitioner Nye pay Guthrie, plaintiff's attorney, \$500.00 (R. 158), that it was "through whose (Guthrie's) untiring efforts and at great

expense discovered and brought to the attention of the Court the contempt for its authority", and further says in this judgment (R. 158), "The Court is of opinion and so holds that the conduct of the respondents is misbehavior so near to the presence of the Court as to obstruct the administration of justice."

The District Court proceeded as in civil contempt. The caption in its findings of fact and judgment (R. 153), in its order to show cause (R. 8), in the motion of plaintiff's counsel (R. 8-12), in the Court minutes showing denial of motions and exceptions (R. 16), and in the motions filed by the petitioners (R. 13, 15, 16) is the caption of the suit for damages for wrongful death, to-wit, "W. H. Elmore, Administrator, etc. against C. T. Council and others, trading as B. C. Remedy Company." There was no order entered characterizing the charge as criminal contempt and the charge took place, if at all, so far from the District Court that it knew nothing about it until the efforts of plaintiff's Counsel, and the testimony of Elmore on the motion to dismiss the main action (R. 7) brought it to the attention of the Court.

A civil contempt cannot be based upon the "So near there to" portion of Section 385, U. S. C. A. Title 28.

*In Re Sixth & Wisconsin Tower, Inc.*, 108 F. (2) 538, 540 (C. C. A. 7).

This case includes the distinction between civil and criminal contempt.

In *Gompers v. Buck's Stove & Range Co.*, 221 U. S., 418, 448, 31 S. Ct., 492, 501, 55 L. Ed., 797, 34 L. R. A. (nS), 874 (C. C. A. 7), it is concluded that the respondents in that case could not be punished for civil contempt under section 385.

While it is admitted in *In Re Sixth & Wisconsin Tower, supra*, that the case was civil contempt and not criminal, the Court says "It is plainly such."

*Terminal R. R. Ass'n v. United States*, 266 U. S., 17, 45 S. Ct. 5, 69 L. Ed. 150;

*Bessette v. W. B. Conkey Co.*, 194 U. S., 324, 24 S. Ct. 665, 48 L. Ed., 997;

*In re Fox*, 3 Cir., 96 F. (2d) 23.

In *Gompers v. Buck's Stove & Range Co.*, *supra*, it seems definitely to be held that if the contempt matter is proceeded with in the original cause, as appears from captions of findings of fact and judgment (R. 153), order to show cause (R. 8), minutes showing denial of motions and exceptions (R. 16), and motion of plaintiff's counsel, Guthrie (R. 9), that the contempt proceeding in the instant case grew out of, and was dependent upon, the main or primary case of *W. H. Elmore, Administrator of James Elmore, deceased v. Council and Bernard, partners as B. C. Remedy Company*. Therefore, the District Court proceeded for constructive civil contempt under the "so near thereto" clause of Section 385, when it did not have power to proceed for civil contempt and did not have power to enter a judgment otherwise.

It is vitally necessary for the protection of the citizen that he be advised clearly whether he is proceeded against for civil or criminal contempt.

The citizen "should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge, but to know that it is a charge and not a suit.

*Gompers v. Buck's Stove & Range Co.*, *supra*;

*United States v. Cruikshank, et al.*, 92 U. S., 542, 569, 23 L. Ed. 588, 593.

In *McCann v. New York Exchange*, 80 Fed. (2) 211, the Second Circuit Court of Appeals suggests that it can be made plain to the respondent if the Judge enters an order *in limine*, directing the attorney to prosecute the respondent

criminally on behalf of the Court, and then says: "We think that, unless this is done, the prosecution must be deemed to be civil and will support no other than a remedial punishment." A reversal was entered because this was not done.

The view thus set forth is in full accord with *Gompers v. Buck's Stove & Range Co., supra*. If criminal contempt be proceeded with as civil-contempt, then the Court is without power to render a punitive judgment and, of course, it could not render a remedial judgment. When inquiry is made into the heart of this proceeding there can be found no affront or obstruction that relates to the District Court. If undue influence was asserted to obtain from Elmore a discharge from his administration in the probate court of Robeson County, North Carolina, then *ex vi termini* there can be no contempt of the District Court in which the suit for damages for wrongful death was pending. The plaintiff must maintain his living status as administrator in the probate court of Robeson County in order to sue for damages for wrongful death. If he does this then, under the Lord Campbell Act, he can maintain his suit for damages as a mere naked trustee for the next-of-kin of his intestate. This right exists in no other person than the personal representative of the deceased. The District Court has no probate jurisdiction and nothing whatever to do with the qualification or discharge of administrators. The plaintiff in making his case must allege, and if denied, prove that he is the administrator of the deceased. The probate court necessarily maintains exclusive power to appoint and discharge administrators to such court.

If, perforce, the conduct of the petitioners may be construed as hostile to any court, then this hostility related to the probate court and not to the District Court, which only had a right to entertain the action for wrongful death as long as Elmore remained administrator of his intestate



and the effect on the District Court from a discharge in the probate court must needs be only incidental.

The petitioners say they did nothing "in a corner", but that Nye, feeling that he was befriending Elmore, took him to the lawyer's office in whom Nye had confidence, as is shown by the fact that he had employed this lawyer to attend to his affairs, and all the evidence shows that, in the lawyer's office, Elmore talked to the lawyer and that Nye ceased to talk when he had told the lawyer the desire that Elmore had made known to him. The evidence is plenary (R. 73) from a deputy clerk, Miss Jenkins, that the Clerk who died prior to these hearings, talked with Elmore and that Elmore gave him his reasons and stated that Mr. Carlyle, a lawyer, had told him that he did not think he could win his damage suit and that after this conversation the Clerk accepted his affidavit and final account and approved it and thereby discharged Elmore as administrator. If the affidavit and final account had been contemptuously procured by the petitioners and filed in this probate court, then whatever powers in respect to punishing the petitioners for such conduct, resided in the probate court and not in the District Court.

In fact, it would seem far fetched to contend that the District Court, which had no concern with the administration of the estate of which W. H. Elmore was administrator, could be interfered with or obstructed in the performance of its duty by acts done in or with reference to the probate court, if undue influence had been asserted upon Elmore to obtain papers closing his administration, then his remedy was by appropriate proceeding in the probate court. The judgment of the trial court in the contempt proceeding results in punishing the petitioners to protect the rights of Elmore, administrator, when, in fact, the record does not disclose that Elmore's rights have been invaded.

The petitioners say they were not guilty of contempt in fact. They contend that the Finding, No. 19 (R. 153) made by the District Court with respect to the petitioner Nye and his business ability and mentality and energy, constitutes merely the Court's opinion of him and does not state a fact that should be held against him, and that there is no basis in the evidence (R. 26, 153) that Elmore was kept from his son's home, or that Nye and Mayers arranged to keep Elmore in their presence until the next morning after the papers were executed, when the evidence (R. 29-30) shows that Elmore did not want to go to the home of his son living in Lumberton and that Elmore suggested that he go to the home of Mayers who had no place that he could take him at that time (R. 137).

The Court concludes, Finding No. 21 (R. 157) that all that Nye did by procuring the writing of the letters to the Court and to plaintiff's counsel, Guthrie, were for the purpose of presenting the prosecution of the civil action in the Federal Court and to obstruct and prevent the trial of the case on its merits. While the Court says that such did cause a long delay, several hearings and expense, there is no finding that Elmore's rights were prejudiced or that the suit in the Federal Court was discharged on account of the filing of the final account in the probate court of Robeson County, North Carolina.

That Elmore may be illiterate and feeble in health and mind certainly does not relate to an invasion of Elmore's rights.

It is submitted that the evidence does not show that Nye furnished any liquor to Elmore or to Mayers, and while Elmore contends that Nye had him to do what he did and that he did not understand it, the testimony of disinterested and unrelated witnesses in large number, make this impossible. While Elmore claimed that he was drunk all the

time he was in Lumberton, the trial court, in Finding No. 23 (R: 158) says Elmore did not remain intoxicated while he signed the letters and false final account, but he was completely under the control and domination of Mayers and Nye, and the Court further finds that neither of the respondents (petitioners here) paid Elmore any sum or promised him any sum whatever to get the case stopped. That Elmore was under the influence of Nye and Mayers was a conclusion. We submit that it would not be contempt or undue influence or a trespass on the rights of Elmore, or contempt of court for one to ask his friend or neighbor to withdraw a law suit against himself, or a kinsman, or a friend, or some person that was neither. The liberty of the citizen certainly is not contemptuous if properly used to end strife and litigation, and unless there is a fraudulent substitution of the mind of the petitioner for the mind of Elmore, then the petitioner has committed no civil trespass. The right of free speech and the right to express one's opinion and to make one's wishes known have not been banned under the present order.

We submit that the evidence fails to show that Nye procured Mayers to go to South Carolina to get Elmore or that he gave him any liquor or expense for the trip. Mayers denies that they did either of these and Nye denies such conduct and no witness testifies that he did either. The trial court concludes that he did from the testimony of Elmore that Mayers gave him liquor.

The petitioners call the attention of the Court to the present style of the caption in this matter. The caption proceeded uniformly until the appeal was filed in the Circuit Court of Appeals for the Fourth Circuit, to be the caption of the suit for damages for wrongful death, but the Clerk of the Circuit Court of Appeals on account of the fact that the judgment of the District Court (R. 158)

required the petitioner Nye to pay \$500.00 to Guthrie, plaintiff's attorney, and to pay a fine of \$500.00 which, if paid, went to the United States, and that Mayers was required to pay a fine of \$250.00, constituted the caption in the Circuit Court of Appeals as "Nye and Mayers vs. United States and Guthrie". The United States Attorney and his Assistant on May 1, 1940 entered an appearance in the Circuit Court of Appeals for the United States of America and until that date, which was after the filing of the transcript of the record in the Circuit Court of Appeals on April 20, 1940, was the first notice that the Department of Justice took of this matter, so far as the record is concerned. Evidently, this appearance, and subsequent appearances, were on account of the amounts taxed by the District Court as fines which were payable to the United States of America, according to the terms of the judgment. Our contention is that the mere styling of the caption in the Circuit Court of Appeals does not relate back and convert this proceeding into criminal contempt and that the petitioners are not guilty in the premises.

**3. Did the judgment of non-suit rendered herein by consent of plaintiff on 13 March, 1940, undermine and render the judgment against respondents in contempt, void?**

On 13 March, 1940, pending the appeal to the Circuit Court of Appeals for the Fourth Circuit, wherein the record was filed on April 20, 1940, the plaintiff procured a judgment of voluntary non-suit in the District Court of the United States in his suit as administrator of James Elmore, deceased against B. C. Remedy Company. This judgment is in usual form of a voluntary non-suit and the cost was taxed against the plaintiff (R. 25). This judgment is assented to by counsel for the plaintiff and by the plaintiff in his capacity as administrator, and personally. Petitioners contend that when this non-suit was taken the plaintiff was satisfied to have his suit dismissed and that he was not will-



ing to prosecute further. Whether plaintiff could proceed by another suit after having taken a voluntary non-suit is of no concern here, because this judgment effectively disposes of the primary action in which, and as a part of which, the contempt proceeding was had. If this proceeding is for civil contempt, then there can be no further remedial process to the aid of the plaintiff when he has voluntarily dismissed his suit. In *Gompers v. Buck's Stove & Range Company, supra*, it is indicated that in civil contempt when the main case is settled and adjudicated that the contempt falls with it. The Court says: "The present proceeding necessarily ended with the settlement of the main cause of which it is a part", and directs that the criminal sentences imposed in the civil case, therefore, should be set aside.

*Bessette v. Conkey*, 194 U. S., 328, 333; 48 L. Ed. 1002;

*Worden v. Searis*, 121 U. S., 27; 10 L. Ed., 858;

*State v. Nathans*, 49 S. C., 207.

How can the house of contempt stand when its foundation has been washed away?

The following cases indicate that the foregoing rule has been widely applied.

*Eustace v. Lynch*, 80 F. (2d) 656.

When the main case has been settled the contempt question becomes moot, because nothing can be then done to give the Court jurisdiction to grant the relief sought in the motion filed to have the respondent adjudged in contempt. The Courts do not pass upon moot questions.

*City of Clearwater, Florida v. Beers*, 90 F. (2d) 80, 82.

In *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U. S. 448, 76 L. Ed., 389, 394, the Court referred to the fact that the proceeding was heard and determined as for civil and not criminal contempt and then says: "The question of the relation of such a proceeding to the main suit was fully considered in the case of *Gompers v. Buck's Stove & Range*

*Co.*, 221 U. S. 418, 55 L. Ed., 797, 34 L. R. A. (N. S.) 874, 31 S. Ct. 492, and it was determined that the proceeding was not to be regarded as an independent one, but was a part of the original cause. The Court said: "Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main cause."

In *Terminal R. R. Association v. United States*, 69 L. Ed., 151, 266 U. S. 17, speaking to the question of contempt, the Court says:

"In these proceedings the United States did not join in the complaint or participate in the hearing in the District Court, but has since appeared and is aligned with the appellees. The proceedings were instituted by the west-side lines not to vindicate the authority of the Court, but to enforce rights claimed by them under the original decree. The controversy is between them and the east-side as to whether the former or the latter shall bear transfer charges on west bound through freight. The nature of the proceedings is civil and remedial, not criminal."

WHEREFORE, petitioners pray that the opinion and judgment of the Circuit Court of Appeals for the Fourth Circuit be reversed, with directions to the District Court to dismiss the proceeding and that error be declared in the judgment of the District Court and that such other orders in respect thereto be entered as may be proper.

Respectfully submitted,

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# INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statute involved.....	2
Statement.....	3
Argument.....	6
Conclusion.....	12

## CITATIONS

### Cases:

<i>Bowles v. United States</i> , 50 F. (2d) 848, certiorari denied, 284 U. S. 648.....	11
<i>Fletcher, In re</i> , 107 F. (2d) 666, certiorari denied, 309 U. S. 664.....	8, 11
<i>Gompers v. Bucks Stove &amp; Range Co.</i> , 221 U. S. 418.....	9, 12
<i>Gompers v. United States</i> , 233 U. S. 604.....	10
<i>McCrone v. United States</i> , 307 U. S. 61.....	8
<i>Morse v. United States</i> , 270 U. S. 151.....	7
<i>Oates v. United States</i> , 233 Fed. 201.....	9
<i>Sona v. Aluminum Castings Co.</i> , 214 Fed. 936.....	11
<i>Sixth &amp; Wisconsin Tower, Inc., in re</i> , 108 F. (2d) 538.....	8, 9
<i>United States v. Goldman</i> , 277 U. S. 229.....	10
<i>Wilson v. Byron Jackson Co.</i> , 93 F. (2d) 577.....	9, 10

### Statutes:

Judicial Code, Sec. 268, 36 Stat. 1163 (U. S. C., Title 28, Section 385).....	2, 8, 11
Act of February 13, 1925, c. 229, 43 Stat. 936, 940 (U. S. C., Title 28, Secs. 230, 350):	
Section 8 (a).....	7
Section 8 (e).....	7
U. S. C., Title 18, Sec. 682.....	10
Criminal Appeals Rules:	
Rule III.....	7, 10
Rule XI.....	6

(1)

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# In the Supreme Court of the United States

OCTOBER TERM, 1940

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No. 558

R. H. NYE AND L. C. MAYERS, PETITIONERS

v.

THE UNITED STATES OF AMERICA AND W. B. GUTHRIE

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH  
CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

## OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 168-174) is reported in 113 F. (2d) 1006.

## JURISDICTION

In our view, the petition for writ of certiorari was not filed in time, with the result that this Court is without jurisdiction. This question is discussed at pp. 6-10, *infra*.

The judgment of the Circuit Court of Appeals was entered August 30, 1940 (R. 174). The petition for writ of certiorari was filed November 7, 1940.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

Only two of the questions presented by the petition for writ of certiorari (pp. 2-3) are discussed by petitioners:

(1) Whether the District Court lacked jurisdiction of the contempt proceeding because a verifying affidavit was not filed concurrently with the motion for an order to show cause.

(2) Whether the contempt judgment is void because the plaintiff in the suit in connection with which the contempt arose settled that suit subsequent to the contempt judgment.<sup>1</sup>

#### STATUTE INVOLVED

The pertinent portion of U. S. C., Title 28, Section 385 (Judicial Code, Sec. 268, 36 Stat. 1163) is as follows:

The said courts [courts of the United States] shall have power \* \* \* to punish, by fine or imprisonment, at the discre-

<sup>1</sup> A question presented but not discussed is whether the petitioners were guilty of contempt. It does not appear what the petitioners contend in this connection. The findings of the District Court (R. 1-6), which the Circuit Court of Appeals said were amply supported by the evidence (R. 169), are set out *in extenso* in the opinion of the appellate court (R. 169-170). That opinion amply demonstrates that the conduct of petitioners in restraining a litigant from the assertion of a valuable claim in a court of justice constituted contempt (R. 172-173).

tion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice \* \* \*

#### STATEMENT

The District Court adjudged the petitioners, R. H. Nye and L. C. Mayers, guilty of contempt of court by reason of conduct tending to obstruct the administration of justice (R. 5-6). Nye was ordered to pay a fine of \$500 and the costs of the contempt proceeding, including the sum of \$500 to W. B. Guthrie, attorney, who, "through whose untiring efforts and at great expense" discovered and brought the contempt to the attention of the court (R. 6), and then prosecuted it. Mayers was ordered to pay a fine of \$250 (R. 6). On appeal the judgment of the District Court was unanimously affirmed by the Circuit Court of Appeals for the Fourth Circuit (R. 168-174).

The evidence may be briefly summarized as follows:

✱ The contemptuous conduct occurred in connection with a suit brought in *forma pauperis* in the District Court of the United States for the Middle District of North Carolina by W. H. Elmore, Administrator, against C. T. Council and Germain Bernard, trading as the B. C. Remedy Company, for damages in the amount of \$30,000 for the

wrongful death of Elmore's son. W. B. Guthrie was appointed as attorney to represent Elmore in that suit (R. 1).

Nye's daughter was married to the son of defendant C. T. Council (R. 19, 28, 151), and Nye undertook, with the aid of petitioner Mayers, his tenant (R. 81) and quondam contractor (R. 82-83), to have Elmore drop the suit (R. 7, 19, 32, 83, 144, 155). To this end, Mayers, who knew Elmore (R. 19), drove some 60 miles to Elmore's home near Conway, South Carolina (R. 43), to bring him to Nye at Lumberton, North Carolina (R. 46). Mayers found Elmore, an illiterate old man, feeble in mind and body (R. 4, 24, 55, 56, 67), working in a ditch (R. 31) and plied him with liquor (R. 7, 29, 31, 33, 35). Mayers took him to Lumberton without having Elmore see his daughter, with whom he lived (R. 7), and who, Elmore informed Mayers, would not "want" him to go to Lumberton (R. 86). Upon their arrival, Nye put in a long distance call at about 8:00 P. M. for his attorney, Timberlake, who was unable to arrive until the next morning (R. 139). Although Elmore had a son residing in Lumberton (R. 95), he was taken to Nye's home where he and Mayers slept in one bed (R. 33).

Early the next morning Mayers and Elmore had breakfast at Nye's expense (R. 25), and then Nye took Elmore to the office of his attorney, Timberlake (R. 25). Timberlake testified that Nye "ex-



plained the whole thing" and told him "the substance of what he wanted the letter [to the District Judge and to Guthrie] to contain" (R. 88), and that he wanted to get Elmore discharged as administrator (R. 92-A3). Thereupon Timberlake drafted a final account of Elmore's administration (R. 88, 92) and letters to the District Judge and to Guthrie requesting them to dismiss Elmore's suit (R. 88). Nye paid for these services (R. 90) and took Elmore to the office of the Clerk of the Superior Court where the final account was filed and Elmore was discharged as Administrator (R. 7, 26, 41-42), Nye paying the costs (R. 26, 142). Nye registered the letters to Guthrie and the District Judge, paying for the postage and a return receipt addressed to Nye (R. 144-146), and then asked Mayers to drive Elmore home (R. 96). Elmore subsequently testified, at a hearing on a motion to dismiss his action on the ground that he had been discharged as administrator and the estate fully administered, that he was induced to sign the letters and final account while in an intoxicated condition and desired to prosecute his action (R. 7-8).

On motion of Guthrie (R. 13-17), the District Court issued a rule on September 30, 1939, directing Nye and Mayers to show cause why they should not be adjudged in contempt (R. 8). A verifying affidavit was filed by Guthrie on October 7, 1939 (R. 171, Pet. 4). Petitioners appeared in answer to the order on October 30, 1939 (R. 9, 18-28).

After a hearing the District Court held that the conduct of the petitioners was "misbehavior so near to the presence of the court as to obstruct the administration of justice" (R. 6). The District Court found, *inter alia*, that the writing of the letters and the filing of the final account were procured by respondent Nye for the express purpose of preventing the prosecution of the civil action in the Federal court and with intent to obstruct and prevent the trial of the case on its merits in that court; that this conduct had caused a long delay, several hearings, and enormous expense, and "that respondent Meares [Mayers] did furnish liquor to Elmore and got him under his (Meares') control, but Elmore did not remain intoxicated while he signed the letters and false final account; but he was completely under the control and domination of Meares and Nye; that neither of the respondents paid Elmore any sum or promised him any sum whatsoever, to get the case stopped" (R. 4, 5-6).

#### ARGUMENT

Petitioners' contentions are, we submit, without merit. In addition, their petition here was filed too late.

1. If the contempt in question is a criminal contempt and the Criminal Appeals Rules promulgated by this Court on May 7, 1934, are applicable,<sup>2</sup>

<sup>2</sup> Rule XI of such Rules provides that "Petition to the Supreme Court of the United States for writ of certiorari to review a judgment of the appellate court shall be made

it is clear that the petition for writ of certiorari in this Court was not filed in time.<sup>3</sup> If, however, the contempt was a civil contempt, the petition for writ of certiorari was timely (Section 8 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940; U. S. C., Title 28, Sec. 350).<sup>4</sup>

It would seem clear that the contempt in question was a criminal contempt. Petitioners were found guilty of "misbehavior so near to the present within thirty (30) days after the entry of the judgment of that court."

<sup>3</sup> The judgment of the Circuit Court of Appeals was entered August 30, 1940 (R. 174). No petition for rehearing suspending the finality of that judgment was entered (see *Morse v. United States*, 270 U. S. 151, 153-154), and the petition for writ of certiorari was not filed in this Court until November 7, 1940, 58 days after the entry of the judgment of the Circuit Court of Appeals, excluding Sundays and legal holidays.

<sup>4</sup> Likewise, if the contempt involved is a criminal one, the appeal to the Circuit Court of Appeals was not in time. Rule III of the Criminal Appeals Rules provides that "An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made \* \* \* the appeal may be taken within five (5) days after entry of the order denying the motion." The certified transcript of record on file in this Court does not contain any motion for a new trial. The combined findings and order of the District Court adjudging petitioners in contempt was filed on February 8, 1940 (R. 1-6; certified transcript on file in this Court, pp. 41-45). The notice of appeal from this order was not filed in the District Court by the petitioners until March 15, 1940, 30 days after the District Court entered its order (certified transcript, p. 54), excluding Sundays and legal holidays. If, however, the contempt was a civil contempt, the appeal was taken in time (Section 8 (e) of the Act of February 13, 1925; U. S. C., Title 28, Sec. 230).



ence of the court as to obstruct the administration of justice" (R. 6). This phrase was patterned on the statutory language of U. S. C., Title 28, Section 385 (*supra*, pp. 2-3). A civil contempt cannot be based upon this portion of Section 385 (*In re Sixth & Wisconsin Tower, Inc.*, 108 F. (2d) 538, 540 (C. C. A. 7th)); which plainly involves punishment for an affront to the authority of the court rather than remedial punishment for the benefit of the complainant. A contempt is civil solely "when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public." (*McCrone v. United States*, 307 U. S. 61, 64, and cases cited.) The motion for the issuance of a rule to show cause was not made by the plaintiff in the main cause and did not ask for damages or other relief for the plaintiff. And no damages or other relief was awarded to him. Guthrie asked for the rule to show cause apparently as an officer of the court and requested the court, *inter alia*, to direct the United States Attorney to investigate the question whether Nye and Mayers conspired to defeat the administration of justice (R. 17). Nye and Mayers were ordered to pay fines which went to the United States and not to the complainant in the principal suit (*In re Fletcher*, 107 F. (2d) 666, 668 (App. D. C.)), and Nye was ordered to pay the costs of the proceeding, including the sum of \$500 to Guthrie, who, through his "untiring efforts and at great expense discovered and brought to the at-



tention of the court the contempt for its authority" (R. 6). If, as is apparent, the proceeding was designed to punish the obstruction of the administration of justice, its criminal nature was not affected by the fact that the moving and other papers were not entitled in the form usually utilized in the case of criminal contempt (*Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 446), or because the petitioner Nye was directed to pay the costs of the proceeding, including counsel fees (*Oates v. United States*, 233 Fed. 201, 207 (C. C. A. 4th); *Wilson v. Byron Jackson Co.*, 93 F. (2d) 577, 578 (C. C. A. 9th)).

Petitioners rely upon an "apparent" conflict between the decision below and *In re Sixth & Wisconsin Tower, Inc.*, *supra*, as a reason for allowance of the writ. In that case, conceded by the parties to be a civil contempt (p. 540), the appellee asked for damages because appellant sent letters to bondholders which were designed to influence them to withhold consent to a plan of reorganization, and he urged that this conduct of appellant amounted to misbehavior "such as to obstruct the administration of justice." The court held that the quoted language had no application to a civil contempt. There is plainly no conflict between that decision and the decision below.

If, as we submit, the contempt was criminal, the Criminal Appeals Rules, with their time limitations upon appeals and petitions for writs of cer-

tiorari, should be deemed to apply. The Criminal Appeals Rules were specifically held applicable to criminal contempts in *Wilson v. Byron Jackson Co.*, 93 F. (2d) 577, and the Circuit Court of Appeals for the Ninth Circuit dismissed an appeal in such a case which was not taken within the five days permitted by Rule III of those Rules.

This decision finds support in *United States v. Goldman*, 277 U. S. 229, 235-236, where it was held that an appeal to this Court would lie in a criminal contempt case under that portion of the Criminal Appeals Act which provides that a direct appeal may be taken "in all criminal cases, in the following instances, to wit: \* \* \* From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy" (U. S. C., Title 18, Sec. 682).

Again, *Gompers v. United States*, 233 U. S. 604, held applicable to a prosecution for criminal contempt the general statute of limitations with reference to criminal offenses, providing that "no person shall be prosecuted, tried, or punished for any offense, not capital, except \* \* \*, unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed" (p. 607).

2. Assuming that this Court has jurisdiction, there is clearly no merit in petitioner's contention that the District Court was without jurisdiction because a verifying affidavit was not filed concurrently with the motion for an order to show cause.

It has been held that an affidavit is not required in a contempt proceeding under Section 385. *In re Fletcher*, 107 F. (2d) 666, 668 (App. D. C.), certiorari denied, 309 U. S. 664; *Bowles v. United States*, 50 F. (2d) 848, 851 (C. C. A. 4th), certiorari denied, 284 U. S. 648. Petitioners were, of course, entitled to be informed of the charges against them so that they could prepare their defense. But this information was set forth in ample detail in the motion for the order to show cause (R. 13-16),<sup>5</sup> and any technical deficiency was made good by the verifying affidavit filed one week later, before petitioners had filed their answers. Moreover, no motion was made to dismiss, on the ground that the omission simultaneously to file the verifying affidavit and the motion went to the jurisdiction of the court, until after the petitioners had put in their evidence (R. 11, 172). Under these circumstances the Circuit Court of Appeals properly held that the petitioners "waived the defect by their participation in the proceeding, even if it be supposed that the filing of an affidavit on October 7 was too late" (R. 172). See *Sona v. Aluminum Castings Co.*, 214 Fed. 936, 940 (C. C. A. 6th), and authorities there cited.

<sup>5</sup> The motion requested the issuance of an order to show cause only against Nye (R. 17), but the order issued against both Nye and Mayers and stated that Guthrie had moved for an order against both (R. 8). And Mayers filed an answer stating that it was in response to a motion filed by Guthrie (R. 18).



3. Petitioners also contend that Elmore's settlement of the main suit (see R. 173-174) renders the judgment in the contempt proceeding void. This contention might find room in a civil contempt proceeding, but a criminal contempt proceeding, such as the instant one, is unaffected by a settlement. *Gompers v. Bucks Stove & Range Co., supra* (p. 451).

#### CONCLUSION

The petition for writ of certiorari was not timely filed. The petition should, in any event, be denied because the case was correctly decided below, and petitioners present neither a conflict of decisions nor a question of general importance.

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DECEMBER 1940.



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# INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statutes and rules involved.....	3
Statement.....	3
Summary of argument.....	11
Argument:	
I. Unless the contempt proceeding was a civil action, the writ of certiorari should be dismissed or the judgment should be reversed with direction to the Circuit Court of Appeals to dismiss the appeal.....	16
II. The contempt adjudicated and charged was unmistakably criminal and the proceeding was appropriate for the purpose.....	24
1. The judgment.....	24
2. The proceedings.....	27
(a) The prayer.....	27
(b) The acts charged.....	28
(c) The parties and the title.....	29
III. The findings support the adjudication of contempt.....	32
1. The petitioners' conduct constituted "misbehavior".....	33
2. The misbehavior was in the presence of the court or "so near thereto as to obstruct the administration of justice".....	36
IV. The trial court was not deprived of jurisdiction by the delay in filing a verification of the motion for order to show cause.....	40
V. The judgment of contempt did not fall with the settlement of Elmore's action for wrongful death.....	42
Conclusion.....	43
Appendix.....	44

## CITATIONS

### Cases:

<i>Aaron v. United States</i> , 155 Fed. 833.....	41, 42
<i>Alaska Packers Assn. v. Pillsbury</i> , 301 U. S. 174.....	17
<i>Bessette v. W. B. Conkey Co.</i> , 194 U. S. 324.....	18, 19, 29, 30
<i>Bowles v. United States</i> , 50 F. (2d) 848, certiorari denied, 284 U. S. 648.....	19

## II

### Cases—Continued.

	Page
<i>Butler v. Butler</i> [1888] 13 L. R. P. D. 73.....	34
<i>Camarota v. United States</i> , 111 F. (2d) 243, certiorari denied, 85 L. Ed. 60.....	42
<i>Christensen Engineering Co., Matter of</i> , 194 U. S. 458.....	24
<i>Call v. United States</i> , 8 F. (2d) 20.....	38
<i>Conley v. United States</i> , 59 F. (2d) 929.....	35
<i>Clark v. United States</i> , 289 U. S. 1.....	36
<i>Cooke v. United States</i> , 267 U. S. 517.....	40
<i>Craig v. Hecht</i> , 263 U. S. 255.....	39
<i>Creekmore v. United States</i> , 237 Fed. 743, certiorari denied, 242 U. S. 646.....	41
<i>Cuddy, Petitioner</i> , 131 U. S. 280.....	33, 35, 37
<i>Doyle v. London Guarantee Co.</i> , 204 U. S. 599.....	29
<i>Fox v. Capital Co.</i> , 299 U. S. 105.....	18, 26
<i>Gompers v. Bucks Stove &amp; Range Co.</i> , 221 U. S. 418.....	19,
25, 27, 29, 36, 43	
<i>Gompers v. United States</i> , 233 U. S. 604.....	19, 23
<i>Grossman, Ex parte</i> , 267 U. S. 87.....	19
<i>Guzzardi, In re</i> , 74 F. (2d) 671.....	30
<i>Halsam, Ex parte</i> , 2 Atk. 49.....	34
<i>Hudgings, Ex parte</i> , 249 U. S. 378.....	36
<i>Kaplan Bros., In re</i> , 213 Fed. 753, certiorari denied, 234 U. S. 765.....	31
<i>Kearny, Ex parte</i> , 7 Wheat. 38.....	19
<i>Keeney v. United States</i> , 17 F. (2d) 976.....	40
<i>King v. Hall</i> , 2 Black. W. 1110, 96 Eng. Rep. 655.....	34
<i>Kitcat v. Sharp</i> , 48 L. T. 64.....	34
<i>Kreplik v. Couch Patents Co.</i> , 190 Fed. 565.....	31
<i>Lamb v. Cramer</i> , 285 U. S. 217.....	26, 27, 28
<i>Leman v. Krentler-Arnold Co.</i> , 284 U. S. 448.....	18
<i>Littler v. Thomsen</i> , 2 Beav. 129.....	34
<i>Lord v. Veazie</i> , 8 How. 250.....	35
<i>McCann v. New York Stock Exchange</i> , 80 F. (2d) 211, certio- rari denied, 299 U. S. 603.....	30, 38
<i>McCrone v. United States</i> , 307 U. S. 61.....	12, 17, 18, 25
<i>Merchants' Stock Co., Re, Petitioner</i> , 223 U. S. 639.....	24, 25, 26
<i>Michaelson v. United States</i> , 266 U. S. 42.....	30, 33
<i>Monroe Body Co. v. Herzog</i> , 18 F. (2d) 578.....	31
<i>Morehouse v. Giant Powder Co.</i> , 292 Fed. 24.....	41, 42
<i>Mulock, Re</i> , 3 Sw. & Tr. 599, 16 Eng. Rep. 1407.....	34
<i>Myers v. United States</i> , 264 U. S. 95.....	18, 19
<i>National Popsicle Corp. v. Kroll</i> , 104 F. (2d) 259.....	30
<i>Nevitt, In re</i> , 117 Fed. 444.....	24
<i>New Orleans v. Steamship Co.</i> , 20 Wall. 387.....	24
<i>Oates v. United States</i> , 233 Fed. 201, certiorari denied, 242 U. S. 633.....	26, 40
<i>Odum, In re</i> , 133 N. C. 250 ( ).....	41
<i>Osborn v. United States</i> , 50 F. (2d) 712.....	17

### III

#### Cases—Continued.

	Page
<i>O'Shea v. O'Shea and Parnell</i> [1890] 15 L. R. P. D. 59.....	25, 34
<i>People v. Severinghaus</i> , 313 Ill. 456.....	41
<i>Reconstruction Finance Corporation v. Prudence, Securities</i> Advisory Group, No. 69, present Term, decided Jan. 6, 1941.....	17
<i>Rez v. Carroll, Wils.</i> , K. B. 74, 85 Eng. Rep. 500.....	34
<i>Robinson, Ex parte</i> , 19 Wall. 505.....	33, 37
<i>Savin, Petitioner</i> , 131 U. S. 267.....	32, 35, 37, 42
<i>Share v. United States</i> , 50 F. (2d) 669.....	17
<i>Sharland v. Sharland</i> , 1 T. L. R. 492.....	34
<i>Sinclair v. United States</i> , 279 U. S. 749.....	38
<i>Sixth &amp; Wisconsin Tower Inc., In re</i> , 108 F. (2d) 538.....	26
<i>Smith v. Lakeman</i> , 26 L. J. Ch. (N. S.) 305.....	34
<i>Snow v. Hawkes</i> , 183 N. C. 365.....	34
<i>Sona v. Aluminum Castings Co.</i> , 214 Fed 936.....	41
<i>Star Spring Bed Co., In re</i> , 203 Fed. 640.....	31
<i>Toledo Newspaper Co. v. United States</i> , 247 U. S. 402.....	15, 19, 32, 38
<i>Toledo Scale Co. v. Computing Scale Co.</i> , 261 U. S. 399.....	18
<i>Turk and Wallen v. State</i> , 123 Ark. 341.....	34
<i>Union Tool Co. v. Wilson</i> , 259 U. S. 107.....	24, 25
<i>United States v. Appel</i> , 211 Fed. 495.....	36
<i>United States v. Bittner</i> , 11 F. (2d) 93.....	28
<i>United States v. Goldman</i> , 277 U. S. 229.....	19
<i>United States v. Pendergast</i> , 35 F. Supp. 593.....	36, 40
<i>United States v. Shipp</i> , 203 U. S. 563, 214 U. S. 386.....	34, 39
<i>United States v. Tousey</i> , 101 F. (2d) 892.....	18
<i>Vaughan v. American Insurance Co.</i> , 15 F. (2d) 526.....	17
<i>Vincennes Steel Corp. v. Miller</i> , 94 F. (2d) 347.....	28
<i>Whittem v. State</i> , 36 Ind. 196.....	34
<i>Wilson v. Byron Jackson Co.</i> , 93 F. (2d) 577.....	18, 19, 25, 26, 29, 31
<i>Williams v. Lyons</i> , 8 Mod. 189, 88 Eng. Rep. 138.....	34
<i>Williams Thomas Shipping Co., In re The</i> , [1930] 2 Ch. 368.....	34
<i>Wingert v. Kieffer</i> , 29 F. (2d) 59.....	31

#### Statutes:

Criminal Code, Sec. 135 (U. S. C., Title 18, Sec. 241).....	37, 46
Judicial Code, Sec. 268 (U. S. C., Title 28, Sec. 385).....	2, 32, 44
Revised Statutes:	
Sec. 974 (U. S. C., Title 28, Sec. 822).....	26
Secs. 5399, 5404.....	37, 46
Act of March 2, 1831, c. 99, 4 Stat. 487.....	33, 36, 37, 45
Act of June 10, 1872, c. 420, 17 Stat. 378.....	37
Clayton Act, c. 323, 38 Stat. 738-739, Secs. 21, 22 (U. S. C., Title 28, Secs. 386, 387).....	20, 31
Act of February 13, 1925, c. 229, 43 Stat. 936, Sec. 8 (c) (U. S. C., Title 28, Sec. 230).....	2, 12, 17, 44
Act of February 24, 1933, c. 119, 47 Stat. 904.....	20
Act of March 8, 1934, c. 49, 48 Stat. 399.....	13, 19, 20, 44



## Statutes—Continued.

	Page
Act of June 19, 1934, c. 651, 48 Stat. 1064, Sec. 1.....	16
Act of June 29, 1940, c. 445, 54 Stat. 688 (U. S. C. A., Title 28, Sec. 723b).....	23
U. S. C., Title 28, Sec. 25.....	19
U. S. C., Title 28, Sec. 654.....	28
Miscellaneous:	
<i>Annual Practice</i> , 1939, p. 809.....	25
23 A. L. R. 187.....	34
Criminal Appeals Rules, promulgated May 7, 1934:	
Rule III.....	17
Rule XI.....	18
Fox, <i>Contempt of Court</i> , pp. 5-43.....	39
p. 44.....	29
pp. 202 et seq.....	33
Fox, <i>The Practice in Contempt of Court Cases</i> , 38 L. Q. R. 185, 188.....	25
Frankfurter and Landis, <i>Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers</i> , 37 Harv. L. Rev. 1010, 1024-1038.....	33, 37
Halsbury's <i>The Complete Statutes of England</i> , Tit. Contempt of Court.....	25
Laski, <i>Constructive Contempt in England</i> , 41 Harv. L. Rev. 1031.....	39
H. Rept. 858, 73d Cong., 2d Sess.....	21, 22
H. Rept. 2047, 72d Cong., 2d Sess.....	21
H. Rept. 2492, 76th Cong., 3d Sess., p. 3.....	23
Robertson and Kirkham, <i>Jurisdiction of the Supreme Court of the United States</i> , Secs. 381, 386 and p. 777, Note 40.....	18
Rules of Civil Procedure:	
Rule 1.....	16
Rule 73.....	17
S. Rept. 257, 73d Cong., 2d Sess.....	21, 22
S. Rept. 1934, 76th Cong., 3d Sess. p. 1.....	23
Thomas, <i>Problems of Contempt of Court</i> :	
pp. 13-17.....	35
pp. 21-27.....	37
pp. 53-74.....	33, 35, 37



# In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 558,

R. H. NYE AND L. C. MAYERS, PETITIONERS

v.

THE UNITED STATES OF AMERICA AND W. B.  
GUTHRIE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

## OPINIONS BELOW

The District Court rendered no opinion. Its findings of fact and judgment appear at R. 153-158. The opinion of the Circuit Court of Appeals (R. 167-173) is reported in 113 F. (2d) 1006.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 30, 1940 (R. 173-174). The petition for a writ of certiorari was filed November 7, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925

(U. S. C., Title 28, Section 347). In the Government's view, neither this Court nor the Circuit Court of Appeals has jurisdiction to review the judgment of the District Court.

#### QUESTIONS PRESENTED

1. Neither the appeal to the Circuit Court of Appeals nor the petition for a writ of certiorari was filed within the time prescribed by the Criminal Appeals Rules, promulgated May 7, 1934. There was no petition for an allowance of an appeal, as required in criminal cases prior to the Criminal Appeals Rules by Section 8 (c) of the Act of February 13, 1925 (U. S. C., Title 28, Sec. 230) and still required in cases which are not governed either by these Rules or by the Federal Rules of Civil Procedure. Both the time and method of appeal were proper, if the Rules of Civil Procedure govern.) The question is whether the civil rules, the criminal rules or the old practice applies to the present case. The answer largely depends on whether the petitioners were accused and adjudged guilty of civil or criminal contempt.

Assuming that this Court has jurisdiction, the following questions arise:

2. Whether the findings of the District Court sustain the judgment holding petitioners guilty of "misbehavior \* \* \* so near" the court "as to obstruct the administration of justice," under

Section 268 of the Judicial Code (U. S. C., Title 28, Section 385) ?

3. Whether the evidence is sufficient to support the findings ?

4. Whether the District Court was without jurisdiction because the motion for a rule to show cause was not verified, although a verification was filed before the respondents answered or the objection was made ?

5. Whether the judgment of contempt should be set aside because of the settlement of the action at law in connection with which the contempt was committed ?

#### STATUTES AND RULES INVOLVED

The statutes and rules involved are set forth in the Appendix, *infra*, pp. 43-45.

#### STATEMENT

On March 18, 1939, W. H. Elmore, administrator of the estate of his son James Elmore, instituted an action, *in forma pauperis*, in the United States District Court for the Middle District of North Carolina against T. C. Council and Germain Bernard, partners, trading as B. C. Remedy Company (R. 153-154). The complaint alleged that James Elmore died as a result of the use of a proprietary medicine known as BC, manufactured and sold by the defendants, and claimed \$30,000.00 damages for negligence and deceit in the manufac-

ture and labeling of this substance. Jurisdiction was based upon diversity of citizenship (R. 1-4). The District Court appointed William B. Guthrie to represent Elmore in the prosecution of the action (R. 153-154). The defendants filed an answer on April 29, 1939, and asked for a jury trial (R. 6, 154).

On April 19, 1939, shortly before the answer was filed, Elmore mailed a letter addressed to District Judge Hayes at Greensboro, North Carolina, asking that his action for wrongful death be dismissed. He enclosed a copy of a letter of the same date to W. B. Guthrie, his attorney, notifying him of his desire to terminate the action. At the request of Guthrie, the court delayed action, pending an investigation (R. 154). On July 20, the petitioner, Nye, appeared with his counsel before the District Court in Greensboro and was examined under oath with respect to his knowledge of Elmore's letters to Judge Hayes and to Guthrie. Nye admitted that he had retained counsel to put a stop to Elmore's action, that Elmore's letters were dictated by this attorney and written by his secretary, that he took Elmore to the post office to mail the letters, retaining the registry receipt himself, and that he also had his attorney prepare Elmore's final account as administrator and took Elmore to the Probate Court to file the account and have himself discharged. But Nye alleged and testified that he did these things at Elmore's request (R. 155).



On August 29, 1939, the defendants moved to dismiss Elmore's action on the ground that he had been discharged as administrator by the Clerk of the Court of Robeson County, North Carolina, and the estate had been fully administered (R. 155). A hearing was held on this motion on September 29, 1939, and W. H. Elmore testified upon oath regarding the circumstances under which he had been discharged as administrator, as follows (R. 7-8):

That on the day before April 19th, 1939, L. C. Mayers came to the place where I was at work near Conway, South Carolina, and gave me some liquor. I was ditching. After talking to me and giving me liquor, he said Mr. R. H. Nye wanted me to come to Lumberton to see him and that Mayers had come after me; that Nye wanted to see me about the case I had in Federal Court against B. C. Remedy Company. He got me intoxicated and persuaded me to go with him to Lumberton right then. He did not want to wait for me to put on clean clothes or notify my daughter, with whom I then lived and promised to bring me back that afternoon. He took me about sixty miles to R. H. Nye's office in Lumberton and there Nye talked to me and told me there was nothing in the case, that lawyer Carlyle was a good lawyer and he said there was nothing to it; that Nye's daughter had married a son of defendant Council and R. H. Nye was anxious to get the same

stopped. He then sent me to his home where I was accompanied constantly by L. C. Mayers, and spent the night, staying with Mayers who continued to supply liquor during the night, and the next morning Mayers turned me over to Nye, who then took me to a lawyer's office where he had me to sign up some papers that I did not understand because of my condition; that Nye took me to the Court House where some other papers were signed but I did not know what they were. He then took me to the Post Office and mailed some papers; that Nye did not pay or promise to pay me anything. And Nye furnished the lawyer, paid for everything and the postage and then sent me home by Mayers; that during all this time I was intoxicated and did not know what I was doing. I did not know that I had sworn that I had fully administered my son James Elmore's estate, and did not know that I had been discharged as administrator, nor that I had signed a letter and mailed it to the Judge of the Federal Court, asking him to dismiss my case against the B. C. Remedy Company. I did not have a chance to communicate with my lawyer and all this was done while I was intoxicated.

I have no education and my occupation was a cotton mill hand.

I do not want the case stopped but I want it tried.

On the following day, September 30, 1939, Guthrie, through an attorney named Brooks, filed a document entitled "Motion for Order to Show Cause" (R. 9-12) in which he set forth among other things the substance of Elmore's testimony, and moved (R. 12):

(1) for an order requiring Nye to show cause why he should not be attached and held for contempt of court;

(2) that the court request the United States Attorney to investigate "whether or not a conspiracy was entered into by and between R. H. Nye, W. E. Timberlake and L. C. Mayers, all of Robeson County, North Carolina, to defeat the administration of justice and the orderly process of this Court and further as to whether or not they have been guilty of subornation of perjury and further whether they conspired to practice a fraud and did practice a fraud upon this Court;"

(3) that "this matter" be submitted to and inquired into by the Grand Jury; and

(4) "For such other and further procedure as to this Court may seem proper."

On the same day the District Judge issued an order directing Nye and Mayers to show cause why they should not be adjudged in contempt of court, "it appearing to the Court that W. H. Elmore, on oath testified to facts that, the said R. H. Nye and L. C. Meyers (Mayers) have been guilty of behavior contemptuous of this Court." (R. 8-9).

Guthrie's motion of September 30 was unverified, but on October 7, 1939, he filed a verification and prayed that it be attached to and made a part of the petition (R. 13). On October 30th, the respondents appeared specially and moved to strike out service of the rule to show cause on the ground that the contemptuous conduct, if any, took place outside the jurisdiction of the court (R. 13-14). The Court apparently treated this objection as a general motion to dismiss the rule and denied it, "The Court being of the opinion that the question to be determined is whether the respondents, or either of them, is guilty of misbehavior in the presence of the Court, or so near thereto to obstruct the administration of justice in this Court, and that is a matter of fact to be determined by the evidence and not on motion." (R. 16). On the same day, the petitioners filed answers giving their own version of the occurrence and denying any wrongful conduct in connection with Elmore's discharge as administrator or any intentional disrespect to the court or intent to interfere with the administration of justice (R. 17-25).

Evidence was thereupon introduced by Guthrie and by the petitioners. Both at the conclusion of the prosecution's testimony and at the end of the case, motions were made to dismiss (R. 16, 153). The court set November 17 for argument of these motions. On that date, petitioners amended their motion to dismiss and for the first time presented



the contention that the court was without jurisdiction to issue the rule to show cause or to proceed because the motion to issue the rule was unverified (R. 15-16).

On February 8, 1940, the District Court filed its findings of facts and judgment (R. 153-158). The court found that Mayers (also referred to as Meares) and Nye, whose daughter was married to the son of C. T. Council, acted in concert to put a stop to Elmore's action against Council and Bernard (R. 156-157). Mayers was Nye's tenant and knew Elmore (R. 156). Nye sent Mayers to bring Elmore to Lumberton from his home in South Carolina (R. 156.) Elmore is illiterate and feeble, both physically and mentally (R. 157). Mayers found him working in a ditch (R. 157), gave him liquor (R. 158) and, without giving him time to change his clothes, took him away with the promise to return him that night (R. 157). As soon as Nye talked to him, he called Timberlake, his attorney, by long distance telephone and arranged to meet him at his office early the next morning. Nye and Mayers arranged to keep Elmore in their presence over night. Although he had a son living in Lumberton, he and Mayers slept at Nye's house. In the morning Nye took Elmore to Timberlake's office, told Timberlake that Elmore wanted to drop his action in the District Court, and that he, Nye, wanted it fixed up so as to end the action once and for all. Nye directed Timber-

lake to prepare the letters to Guthrie and to the District Judge, and to have Elmore discharged as administrator (R. 157). While Elmore did not remain intoxicated until he signed the letters and final account, he was completely under the domination of Mayers and Nye, neither of whom paid or promised him anything to discontinue the action (R. 158). Nye acted with the express purpose of obstructing the trial of the action on its merits. His and Mayer's conduct caused a long delay, several hearings and enormous expense (R. 157-158).

On these facts, the Court adjudged Nye and Mayers guilty of contempt of court, holding that their conduct constituted "misbehavior so near to the presence of the court as to obstruct the administration of justice." Nye was ordered to pay a fine of \$500 and costs of the contempt proceedings, including \$500 to Guthrie, who "through \* \* \* untiring efforts and at great expense discovered and brought to the attention of the court the contempt for its authority." Mayers was fined \$250. They were ordered to stand committed until they complied with the judgment (R. 158). Exceptions to the findings and judgment were allowed by the District Court (R. 158-159).

On March 13, 1940, Elmore, with the assent of Guthrie, took a voluntary non-suit in his action for wrongful death (R. 25) upon payment of a "substantial sum" (R. 173). On March 15, 1940, the petitioners filed a notice of appeal from the judg-

ment of contempt (R. 165) and statement of points to be relied upon (R. 159-164). When the case was docketed in the Circuit Court of Appeals, the United States was made a party. Appearances were entered on its behalf by the United States Attorney and an Assistant United States Attorney, but they took no further part in the proceedings (R. 167).

The Circuit Court of Appeals held that the findings were "amply supported by the evidence" (R. 168); that the conduct of the petitioners "interfered with the court in the performance of its functions" and constituted misbehavior "so near thereto as to obstruct the administration of justice," under Section 268 of the Judicial Code (U. S. C., Title 28, Sec. 385); that it was not essential that the motion for a rule to show cause be verified and, if it was essential, the verification, filed before the petitioners responded to the rule, sufficed to remedy the defect; and, finally, that the settlement of Elmore's action did not affect the proceedings for contempt (R. 170-173). The judgment was unanimously affirmed on August 30, 1940 (R. 173-174).

#### SUMMARY OF ARGUMENT

##### I

If the contempt proceeding was not a civil action at law to which the Rules of Civil Procedure apply, there are fatal objections both to the jurisdiction of this Court and to that of the Circuit



Court of Appeals. The appeal to the Circuit Court of Appeals was neither petitioned for nor allowed; it was taken by notice of appeal. Hence, if the practice is governed by Section 8 (c) of the Act of February 13, 1925 (U. S. C., Title 28, Sec. 230) the appeal was improperly perfected and the Circuit Court of Appeals was without jurisdiction (*McCrone v. United States*, 307 U. S. 61). If the Criminal Appeals Rules promulgated May 7, 1934, are applicable, the notice of appeal was effective. But in that event both the appeal to the Circuit Court of Appeals and the petition for a writ of certiorari were filed too late.

The Government concedes that the Rules of Civil Procedure apply if the contempt was civil and argues that if the contempt was criminal, the Criminal Rules apply. This result accords with the traditional view of contempts as civil or criminal proceedings for most of the purposes which make the distinction important. It also accords with the intention of Congress in authorizing the promulgation of the Civil Rules, the Criminal Appeals Rules and, recently, rules governing proceedings in criminal cases prior to and including verdict or finding. If criminal contempts are not included in the Criminal Appeals rules, they are beyond the rule-making power under the recent statute. In consequence, an unfortunate and unanticipated hiatus would exist in the power of the Supreme Court to regulate procedure in the District Courts.



The language of the enabling Act of March 8, 1934 (C. 49, 48 Stat. 399) does not require this result.

## II

The contempt adjudicated and charged was unmistakably criminal and the proceeding was appropriate for the purpose. For purposes of appeal, the nature of the judgment is decisive of the criminal or civil character of the contempt. The judgment in the present case was clearly criminal; it imposed unconditional fines payable to the United States. Apart from the nature of the sentence, the judgment specifically found the petitioners guilty of misbehavior so near the presence of the court as to obstruct the administration of justice. This was unequivocal evidence that the purpose of the fines and of the adjudication of contempt was to vindicate the authority of the court, not to perfect the remedies of a private suitor.

If the proceedings anterior to the judgment are also examined, they support the same conclusion. The prayer of the motion for a rule to show cause was not for remedial punishment in aid of the main suit. It speaks the language of public justice not of private litigation. The acts charged were unmistakably criminal contempt, if contempt at all. They did not violate a court order; they obstructed the work of the court and attempted to deceive the judge. Moreover, the respondents to the rule to show cause were not parties to a pend-

ing action; they were strangers. And the movant for the rule was not the plaintiff in the action, but his attorney. While the proceedings were entitled in the original action and the United States was not a party until the appeal, neither circumstance is decisive of the nature of the contempt. The defendants could not have been uncertain that punishment rather than relief was the object in view.

Since the contempt was criminal the jurisdictional objection must prevail. In any event, the proceedings were adequate to support the imposition of a criminal penalty.

### III

The findings of fact support the conclusion that the petitioners were guilty of misbehavior so near the presence of the court as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code.

The petitioners' conduct was contumacious. It was a deliberate attempt to thwart the prosecution of an action by undue influence exercised on the litigant and misrepresentation made to the court. There is ample authority that such an attempt is a contempt when the means consists of force or threats directed against a suitor. The type of influence exerted in the present case is indistinguishable. Moreover, the conduct of the petitioners amounted to a misrepresentation. It is recog-

nized that falsehood may have obstructive qualities which warrant a finding of contempt.

The closer question is whether the misbehavior was in the presence of the court or "so near thereto as to obstruct the administration of justice." We contend that it was. The early view that the power of summary punishment in cases of misbehavior is confined by the statute to assuring order and decorum in court has been abandoned. It is also clear that the language is not to be "spatially construed." It is unnecessary to rely upon the majority opinion in *Toledo Newspaper Co. v. United States*, 247 U. S. 402; the present case falls fairly within the dissenting opinion of Mr. Justice Holmes. A court without plaintiffs cannot do business as a court. While the petitioners' effort to eliminate Elmore as a plaintiff ultimately failed, there was an actual obstruction of the administration of justice. Moreover, the letter which the petitioners had Elmore write to the judge was itself contumacious. They were therefore guilty of misbehavior in the actual presence of the court.

#### IV

There is no merit in the contention that the District Court was without jurisdiction because the verification was filed a week after the motion for an order to show cause. The petitioners were not attached on the basis of the motion and raised no objection on this score until after they had an-

swered and the evidence had been taken. Accordingly, if there was a technical defect, it was waived. Moreover, the principal allegations of the motion had been sworn to in open court before the motion was made. Under these circumstances, the court might have issued the rule *sua sponte*. The respondents to the rule were entitled to be advised of the nature of the charge against them and to be given a fair opportunity to defend. They do not contend that these rights were denied.

## V

Petitioners argue that the settlement of Elmore's action for wrongful death, pending this appeal, requires the judgment of contempt to be set aside. The contention rests upon the premise that the contempt was civil and the premise is unsound.

## ARGUMENT

### I

UNLESS THE CONTEMPT PROCEEDING WAS A CIVIL ACTION, THE WRIT OF CERTIORARI SHOULD BE DISMISSED OR THE JUDGMENT SHOULD BE REVERSED WITH DIRECTION TO THE CIRCUIT COURT OF APPEALS TO DISMISS THE APPEAL

If the contempt proceeding was not a civil action at law to which the Rules of Civil Procedure apply (see Act of June 19, 1934, c. 651, Sec. 1, 48 Stat. 1064; Rules of Civil Procedure, Rule 1) there are fatal objections both to the jurisdiction of this Court and to that of the Circuit Court of Appeals.



1. The appeal to the Circuit Court of Appeals was neither petitioned for nor allowed; it was taken by notice of appeal. The notice would be effective under the Rules of Civil Procedure (Rule 73) or under the Criminal Appeals Rules, promulgated May 7, 1934 (Rule III). But if neither set of rules is applicable, the notice was insufficient. For in that event, the practice is governed by Section 8 (c) of the Act of February 13, 1925, (U. S. C., Title 28, Sec. 230) which requires an application to be made. A notice of appeal is ineffective to meet this requirement and the requirement is apparently jurisdictional (*McCrone v. United States*, 307 U. S. 61; *Alaska Packers Assn. v. Pillsbury*, 301 U. S. 174; *Osborn v. United States*, 50 F. (2d) 712 (C. C. A. 4th); *Share v. United States*, 50 F. (2d) 669 (C. C. A. 8th); *Vaughan v. American Insurance Co.*, 15 F. (2d) 526 (C. C. A. 5th). The decision in *Reconstruction Finance Corporation v. Prudence Securities Advisory Group*, No. 69, present Term, decided January 6, 1941, was not, presumably, intended to affect this rule in cases governed by Section 8 (c) of the Act of 1925.

2. If the Criminal Appeals Rules are applicable, the notice was effective under Rule III but both the appeal to the Circuit Court of Appeals and the petition for a writ of certiorari were filed too late. Rule III requires that an appeal be taken within five days after entry of judgment of conviction or of an order denying a motion for a new trial.

Rule XI requires that petitions for writ of certiorari to review a judgment of the appellate court shall be made within thirty days after the entry of judgment of that court. In the present case, the notice of appeal was filed more than a month after the judgment and sentence of the District Court and the petition for a writ of certiorari was filed fifty-eight days, excluding Sundays and holidays, after the judgment of the Circuit Court of Appeals. Timeliness of appeal and petition are jurisdictional requirements (*Toledo Scale Co. v. Computing Scale Co.*, 261 U. S. 399, 417-418; Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, Secs. 381, 386, and p. 777, note 40; *Wilson v. Byron Jackson Co.*, 93 F. (2d) 577 (C. C. A. 9th); *United States v. Tousey*, 101 F. (2d) 892 (C. C. A. 7th).

3. While contempt proceedings are inescapably hybrid (see *Myers v. United States*, 264 U. S. 95, 103; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 326), we think the new procedural rules are applicable and that the distinction between civil and criminal contempt determines which of the rules apply.

*McCrone v. United States*, 307 U. S. 61, 65, suggests though it does not hold that the Rules of Civil Procedure are applicable to civil contempt. The remedial function of such proceedings and the tradition to regard them as an aspect of the civil case in which the contempt occurs (*Fox v. Capital Co.*, 299 U. S. 105, 107-108; *Leman v. Krentler*-

*Arnold Co.*, 284 U. S. 448, 452-454), hardly permit any other result.

A comparable tradition views criminal contempts as criminal cases for most<sup>1</sup> though not all,<sup>2</sup> of the purposes for which the classification is important. In accordance with this tradition and the punitive function of criminal contempt, we should expect the Criminal Rules to apply. The decision in *Wilson v. Byron Jackson Co.*, 93 F. (2d) 577 (C. C. A. 9th) holds that they do. An argument to the contrary may, however, be founded on the language of the enabling Act of March 8, 1934, c. 49, 48 Stat. 399, and of the Order promulgating the Rules. The Act refers to "any

<sup>1</sup> Cf. *United States v. Goldman*, 277 U. S. 229, 235 (direct appeal by the Government under the Criminal Appeals Act); *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 336 (included in statute conferring appellate jurisdiction in "criminal cases"); *Ex parte Kearny*, 7 Wheat. 38; *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 410 (criminal convictions not reviewable by Supreme Court on writ of error); *Ex parte Grossman*, 267 U. S. 87 (within the power of the President to pardon "offences against the United States"); *Gompers v. United States*, 233 U. S. 604 (included in statute of limitations applicable to "any offense not capital"); see also *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 444, 446, 448 (self-incrimination, right to be informed and presumption of innocence).

<sup>2</sup> Cf. *Gompers v. United States*, 233 U. S. 604, 610; *Ex parte Grossman*, 267 U. S. 87, 116 (constitutional right to jury trial); *Myers v. United States*, 264 U. S. 95 (venue). See also *Bowles v. United States*, 50 F. (2d) 848 (C. C. A. 4th), certiorari denied, 284 U. S. 648 (affidavit of prejudice under U. S. C., Title 28, Sec. 25).

or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases." The Order speaks of "all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived." See 292 U. S. 660, 661. Both are applicable in terms to cases in which the contemnor pleads guilty or in which there is a right to a jury trial under Sections 21 and 22 of the Clayton Act, c. 323, 38 Stat. 730, 738-739 (U. S. C., Title 28, Secs. 386-387). But neither the Act nor the Order specifically refers to proceedings after finding of guilt by a trial court where there is no right to a jury and a jury has, therefore, not been waived—a typical situation in cases of criminal contempt. We contend that the Rules are applicable, nevertheless; that, under the language quoted, they apply "in criminal cases"; and that the remaining words are simply descriptive of the ordinary situations in which there has been a finding of guilt. In our view, the questionable language serves to designate the finding as the stage of the proceedings "in criminal cases" at which the rule-making power was to attach and the rules to begin to operate, not the kinds of cases in which the rules were to apply.

This contention is supported by the history of the enabling Act of 1934. The dominant purpose of the statute like that of the earlier Act of February 24, 1933 (c. 119, 47 Stat. 904) was to expedite



the disposition of criminal appeals<sup>3</sup> The precise language of the amended statute was the product of a doubt that the earlier Act empowering the court to prescribe rules "after verdict in criminal cases" would apply to cases in which the finding of guilt was by the court. The problem was noted by the Chief Justice in a letter to the Attorney General, dated January 11, 1934, with reference to the draft of proposed rules submitted by the Department of Justice. The Chief Justice said:

\* \* \* In this draft, rules are proposed with respect to proceedings after "a verdict of guilty or finding of guilt by the trial court." The statement as "to finding of guilt" presumably has references to cases in which trial by jury has been waived. It is not clear that a finding by the court in such a case would be deemed to be a "verdict" within the meaning of the Act conferring authority to prescribe rules. Without intimating an opinion upon this question, it is desirable that any doubt should be removed by an explicit statement. It is manifestly not desirable that there should be different times and manner of procedure in cases of appeal where there is a verdict of a jury as distinguished from those in which there is a finding of guilt by the court on the waiver of a jury.

<sup>3</sup> See H. Rept. 2047, 72d Cong., 2d Sess.; S. Rept. 257, 73d Cong. 2d Sess.; H. Rept. 858, 73d Cong., 2d Sess.

After consultation with the other members of the Supreme Court, and in order to remove all questions as to the authorized scope of the rules to be promulgated, I suggest that it would be well to propose an amendment to the statute so as expressly to cover cases in which there has been a finding of guilt by the trial court and cases of pleas of guilty \* \* \*

It seems clear that the amendatory Act of 1934 purported to embody this suggestion. And while the precise language may have its roots in the understanding of "finding of guilt" to refer to the usual case in which trial by jury has been waived, the articulate purpose of the amendment was to broaden the statute to avoid the limiting connotations of the word "verdict." It was deemed to be undesirable to have different appellate procedures for conviction on jury verdict and conviction by the court on waiver of jury. (See S. Rept. 257, 73d Cong., 2d Sess.; H. Rept. 858, 73d Cong., 2d Sess.); there is even less reason to differentiate between cases where the court's finding of guilt is made after waiver of jury and cases where there was no right to jury trial which might be waived.

If the enabling Act and the Order are inapplicable to criminal contempts tried without a jury, there is an unfortunate and, so far as we know, unanticipated hiatus in the power of the Supreme Court to regulate procedure in the District Courts. The Court is now authorized to prescribe "rules of pleading, practice, and procedure with respect to

any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases" (Act of June 29, 1940, c. 445, 54 Stat. 688 (28 U. S. C. A., Sec. 723b)). The language thus parallels and complements that of the Act authorizing the Criminal Appeals Rules. The framers of the Act of 1940 certainly believed that it filled the last gap in the rule-making power of this Court; "such was the understanding of the Congress." But if the Act of 1934 and the Criminal Appeals Rules are inapplicable to criminal cases in which there is a finding of guilt by the court but no waiver of jury, the Act of 1940 must similarly be inapplicable to such proceedings before finding. The language of the statutes certainly does not require this result.

*Gompers v. United States*, 233 U. S. 604, 611, affords a persuasive analogy. The statute of limitations for criminal offenses outlawed prosecution, trial or punishment "unless the indictment is found, or the information is instituted" within three years after the offense was committed. This

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\* See the letter of Attorney General Murphy to Speaker Bankhead, quoted in H. Rept. 2492, 76th Cong., 3d Sess., p. 3.

† Cf. S. Rept. 1934, 76th Cong., 3d Sess., p. 1: "This Bill gives to the Supreme Court the rule-making power in criminal cases it has now over proceedings of a civil character; extending its power to make rules in criminal cases both before verdict or guilty finding or plea, as well as after." See also H. Rept. 2492, 76th Cong., 3d Sess., p. 2.



Court held the statute applicable to proceedings for criminal contempt not prosecuted by indictment or information. The quoted words were regarded as descriptive of the usual modes of instituting prosecution which occurred to the draftsman, not as determinative of the prosecutions barred.

## II

THE CONTEMPT ADJUDICATED AND CHARGED WAS UNMISTAKABLY CRIMINAL AND THE PROCEEDING WAS APPROPRIATE FOR THE PURPOSE

### 1. The Judgment

Whatever may be true of their anterior stages, proceedings which culminate in a judgment of contempt are not ambiguous for purposes of appeal. If the judgment imposes unconditional fine or imprisonment, it is of criminal contempt. If it imposes a compensatory fine payable to the injured party or a fine or imprisonment conditional upon disobedience to an order of the court made for the benefit of a party, if the contemnors "carry the keep of their prison in their own pockets" (*In Re Nevitt*, 117 Fed. 444, 461 (C. C. A. 8th)), it is for civil contempt. And where the judgment embodies both sanctions, its character for this purpose is determined by its criminal aspect (*New Orleans v. Steamship Co.*, 20 Wall. 387; *Matter of Christensen Engineering Co.*, 194 U. S. 458; *Re Merchants' Stock Co., Petitioner*, 223 U. S. 639; *Union Tool Co. v. Wilson*, 259 U. S. 107, 110;



*McCrone v. United States*, 307 U. S. 61; *Wilson v. Byron Jackson Co.*, 93 F. (2d) 577 (C. C. A. 9th). See also *O'Shea v. O'Shea and Parnell* [1890] 15 L. R. P. D. 59, 62-63). These rules govern the procedure to be followed in invoking appellate review; and they have the simplicity desirable in rules serving this procedural end. If review is properly invoked, the appropriateness of the proceedings to support the judgment is, of course, an open question (See *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 449; *Re Merchants' Stock Co., Petitioner, supra*).

Measured by this test, it is clear that the judgment in the present case was criminal, not civil.\* It awards no relief to a private litigant. Instead, it imposes unconditional fines payable to the United States. While Nye was ordered to pay the costs of the contempt proceeding, including \$500 to Guthrie, who brought the contempt to the attention of the court and conducted the prosecution, an order to pay the expenses of prosecution, including an attorney's fee, is a common incident of judgments imposing fines for criminal contempt. *Re Merchants' Stock Co., Petitioner, supra; Union*

\* Compare the English terminology which usually distinguishes between criminal contempt and contempt in procedure. See Fox, *The Practice in Contempt of Court Cases*, 34 L. Q. R. 185, 188; 7 Halsbury's *The Complete Statutes of England*, Tit. Contempt of Court. *Annual Practice*, 1939, p. 809, distinguishes between "special" and "ordinary" contempts.

*Tool Co. v. Wilson*, *supra*; *Oates v. United States*, 233 Fed. 201 (C. C. A. 4th); *Wilson v. Byron Jackson Co.*, *supra*. In *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 447 there was a sentence of imprisonment which, under the statute, precluded a fine. However, Rev. Stat., Sec. 974 (U. S. C., Title 28, Sec. 822) authorizes assessment of costs against convicted defendants in non-capital cases (See *Oates v. United States*, 233 Fed. 201, 207 (C. C. A. 4th), certiorari denied, 242 U. S. 633). Even were the award of costs to be reviewed as compensatory relief, "the unitive feature of the order is dominant and fixes its character for purposes of review" (*Re Merchants' Stock Co., Petitioner*, 223 U. S. 639 at p. 642).

Apart from the nature of the sentence, the judgment specifically found the petitioners guilty of misbehavior so near the presence of the court as to obstruct the administration of justice. This was unequivocal evidence that the purpose of the fines and of the adjudication of contempt was to vindicate the authority of the court not to perfect the remedies of a suitor (cf. *Fox v. Capital Co.*, 299 U. S. 105, 108). In none of the cases in which the character of a contempt has been in issue, was the judgment based upon this ground (cf. *In Re Sixth & Wisconsin Tower Inc.*, 108 F. (2d) 538, 540 (C. C. A. 7th) rather than the violation of an order of the court or interference with its execution (cf. *Lamb v. Cramer*, 285 U. S. 217)).

We submit, therefore, that the nature of the

judgment alone stamps the contempt as criminal for purposes of appellate review. In that event, as we have previously urged, this Court is without jurisdiction.

## 2. The Proceedings

### (a) *The Prayer.*

The same conclusion is required, if we look behind the judgment to the anterior proceedings. The prayer of the motion for a rule to show cause has been said to be "determinative," at least when the petition is dismissed (*Lamb v. Cramer*, 285 U. S. 217, 220) and is highly significant in any event (see *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 448-449). The prayer here was not for remedial punishment in aid of the main suit. It was (1) for an order to show cause why Nye should not be attached and held as for contempt of court; (2) for a direction to the United States Attorney to investigate whether Nye, Timberlake and Mayers conspired to defeat the administration of justice and to practice a fraud on the court, and whether they were guilty of subornation of perjury; (3) for a grand jury inquiry; and (4) for "such other and further procedure as to this Court may seem proper" (R. 12). Nothing was asked for Guthrie, who made the motion; nothing for Elmore, the plaintiff in the original action. There is not even a request for additional "relief" of any kind (cf. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 448-449). What is sought is an adjudication of contempt and, in



addition, an investigation, by the ordinary methods of the criminal law, of the contumacious acts alleged. This is the language not of private litigation but of public justice. It is hard to believe that had the petitioners been acquitted, it would have been held that Guthrie could appeal (cf. *Wingert v. Kieffer*, 29 F. (2d) 59 (C. C. A. 4th); *United States v. Bittner*, 11 F. (2d) 93 (C. C. A. 7th); *Lamb v. Cramer*, *supra*).

(b) *The Acts Charged.*

What has been said as to the judgment (*supra*, pp. 24-26) is true of the acts charged; if they constituted contempt at all, the contempt was unmistakably criminal. The analogous cases of obstruction of justice by interfering with witnesses, jurors and litigants, as well as with the court itself (See Point III, *infra*, pp. 33-35) have all been viewed as criminal not civil contempt. While neither the motion nor the order to show cause used the word "criminal" or referred to misbehavior so near the presence of the court as to obstruct the administration of justice, the court stated at an early stage of the proceedings that this was the issue to be tried (R. 16). Subpoenas *ad testificandum*, were issued to W. H. Elmore and others residing outside the Middle District of North Carolina and more than a hundred miles from the place where the court was held (R. 165). This could only have been authorized in a criminal case (U. S. C. Title 28, Sec. 654; see *Vincennes Steel Corp. v. Miller*, 94 F. (2d) 347 (C. C. A. 5th)).



(c) *The Parties and the Title.*

Nye and Mayers were not parties to Elmore's action. They were not in a position analogous to that of a party (cf. *Lamb v. Cramer*, 285 U. S. 217). They were strangers to the proceedings. This alone has been held to stamp an adjudication of contempt as criminal (*Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 329; see also *Doyle v. London Guarantee Co.*, 204 U. S. 599, 605; *Wilson v. Byron Jackson Co.*, 93 F. (2d) 577, 578 (C. C. A. 9th); Fox, *Contempt of Court*, p. 44). Moreover, the movant in the contempt proceeding was not Elmore but Guthrie, an attorney and officer of the court. In the preliminary investigation which led to the issuance of the rule, Guthrie subpoenaed Elmore and examined him as an hostile witness (R. 54-55).

It is true that the proceedings in the District Court were entitled in Elmore's action and that the United States was not a party until the appeal; and that both circumstances have been regarded as important indicia of the nature of a contempt proceeding (*Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 445-446). The Second Circuit has, indeed, adopted the rule that a contempt proceeding looking to the imposition of criminal penalties must be prosecuted by the court *sua sponte*, by the United States Attorney, or by an attorney for the private party specially ordered to prosecute criminally on behalf of the court (See *McCann v. New York Stock Exchange*, 80 F. (2d) 211, cer-

tiorari denied, 299 U. S. 603), though the order need not be entered at the outset (*National Pop-sicle Corp. v. Kroll*, 104 F. (2d) 259).

We recognize the value of the practice thus devised but deny its necessity in cases such as the one at bar. For unlike the cases in the Second Circuit, this prosecution was not for violating an order of the Court—the situation in which ambiguity as to the nature of the proceeding is typically present (see *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418; *Re Merchants' Stock Co., Petitioner*, 223 U. S. 639; *In Re Guzzardi*, 74 F. (2d) 671, 672 (C. C. A. 2d)). It was for misbehavior so near the presence of the court as to obstruct the administration of justice. The basis for the rule of the Second Circuit, the inherent ambiguity of the proceeding (see *McCann v. New York Stock Exchange*, *supra*, at 214) is, therefore, missing in the present case. The petitioners ought not to have been uncertain “whether relief or punishment was the object in view” (*Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 446; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 329). Moreover, however the Second Circuit would view the problem in the present case, it is abundantly clear that in other circuits, including the Fourth, neither the fact that the papers are entitled in the original action nor the fact that the prosecution was conducted by an attorney for the private party is decisive of the nature of the proceeding or of its

sufficiency to support criminal penalties? It may also be noted that when Congress in the Clayton Act tightened the procedural requirements in a class of contempt cases, which this Court held to be "criminal" in nature (*Michaelson v. United States*, 266 U. S. 42, 65), it provided for the institution of proceedings "upon the affidavit of some credible person" as well as upon information filed by the District Attorney or the return of a proper officer on lawful process (U. S. C., Title 28, Sec. 387).

Finally, we think the procedure in the present case would satisfy even the strict rule of the Second Circuit. The contempt prosecution, at least as against Mayers, appears to have been instituted by the Judge *sua sponte*, for Guthrie's motion asks for an order to show cause directed only to Nye (R. 12) although the order which was issued recites that the motion was directed against both (R. 8). There is also some indication in the recitals of the order to show cause that the judge based his order upon the sworn testimony of Elmore, which had been given on the preceding day in connection with the motion to dismiss, rather

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<sup>1</sup> *Kreplik v. Couch Patents Co.*, 190 Fed. 565 (C. C. A. 1st); *In re Star Spring Bed Co.*, 203 Fed. 640 (C. C. A. 3d); *In Re Kaplan Bros.*, 213 Fed. 753 (C. C. A. 3d), certiorari denied, 234 U. S. 765; *Wingert v. Kieffer*, 29 F. (2d) 59 (C. C. A. 4th); *Monroe Body-Co. v. Herzog*, 18 F. (2d) 578 (C. C. A. 6th); *Wilson v. Byron Jackson Co.*, 93 F. (2d) 577 (C. C. A. 9th). See also *Gompers v. Bucks Store & Range Co.*, 221 U. S. 418, 446.



than upon the averments of Guthrie's petition, which indeed did little more than transcribe Elmore's testimony (R. 7, 10-11). Approximately the same procedure was followed in *Savin, Petitioner*, 131 U. S. 267, where the trial court, upon oral statements of the United States Attorney that Savin had endeavored to corrupt a witness in a pending criminal case, heard the testimony of the witness alleged to have been approached and thereupon issued an order to show cause.

We submit, therefore, that not only the judgment and sentence but also the charge and proceedings indicate that this was a criminal contempt; and that, if the issue can be examined, the proceedings were not inappropriate as a basis for such an adjudication.

### III

#### THE FINDINGS SUPPORT THE ADJUDICATION OF CONTEMPT

Petitioners argue that the facts found by the District Court do not constitute "misbehavior \* \* \* so near" the presence of the court "as to obstruct the administration of justice," within the meaning of Section 268 of the Judicial Code (U. S. C., Title 28, Sec. 385). We submit that the contention is unsound.

In spite of the statement in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 418, that Section 268 "conferred no power not already granted



and imposed no limitations not already existing," we are content to measure the power of the District Court by the statute alone. That such was the purpose of the Act of March 2, 1931 (c. 99, 4 Stat. 487) from which Section 268 derives has been made abundantly clear (See Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1024-1038; Fox, *Contempt of Court*, p. 202 *et seq.* Thomas, *Problems of Contempt of Court*, pp. 53-74). Whatever may be true as to the powers of this Court (*Ex parte Robinson*, 19 Wall, 505, 510), the powers of the District Courts are within the control of Congress (*cf. Michaelson v. United States*, 266 U. S. 42, see *Cuddy, Petitioner*, 131 U. S. 280, 285). The question therefore is whether, within the meaning of the statute, the conduct of the petitioners constituted "misbehavior" and, if so, whether it was "so near" the presence of the court "as to obstruct the administration of justice."

#### 1. The Petitioners' Conduct Constituted "Misbehavior"

The word "misbehavior" must presumably be read as a general designation of contumacious conduct; the limiting words of the statute are those which require that it be "in the presence of the court or so near thereto as to obstruct the administration of justice". That the petitioners' behavior, on the facts found, was contumacious we

see no reason to doubt. It was a deliberate attempt to thwart the prosecution of an action by undue influence, exercised on the litigant and misrepresentation made to the court. Authority is not wanting, either in England\* or in this country,\* that such an attempt is a contempt when the means consists of force or threats directed against a suitor. The type of influence exerted in the present case is indistinguishable, as the Circuit Court of Appeals held (R. 173). What is significant is that the will of the litigant is controlled by improper means. The closest case in this Court is perhaps *United States v. Shipp*, 203 U. S. 563, 214 U. S. 386, in which the lynching of a prisoner sentenced to death, after a stay of execution granted by the Supreme Court, was held to be a contempt. The opinion by Mr. Justice Holmes disregards the contention that the stay was not addressed to the mob and rests upon the ground

\* See *Williams v. Lyons*, 8 Mod. 189, 88 Eng. Rep. 138; *Rex v. Carroll*, Wils., K. B. 74, 95 Eng. Rep. 500; *King v. Hall*, 2 Black. W. 1110, 96 Eng. Rep. 655; *Re Muloch*, 3 Sw. & Tr. 599, 164 Eng. Rep. 1407; *Smith v. Lakeman*, 26 L. J. Ch. (N. S.) 305; *Sharland v. Sharland*, 1 T. L. R. 492; *Kitcat v. Sharp*, 48 L. T. 64; *Of. Ex parte Halsam*, 2 Atk. 49. For cases of publications abusive of a litigant, see *In re The Williams Thomas Shipping Co.* [1930] 2 Ch. 368; *O'Shea v. O'Shea and Parnell* [1890] 15 L. R. P. D. 59; *Butler v. Butler* [1888] 13 L. R. P. D. 73; *Litler v. Thomson*, 2 Beav. 129.

\* *Turk and Wallen v. State*, 123 Ark. 341; *Snow v. Hawkes*, 183 N. C. 365; see *Whittem v. State*, 36 Ind. 196, 215; 23 A. L. R. 187.

that the purpose of the murder was to frustrate an appeal. The situation, which is in many respects weaker, of attempting to bribe or influence a juror or witness has also been held contumacious (*Savin, Petitioner*, 131 U. S. 267; *Cuddy, Petitioner*, 131 U. S. 280). To induce a defendant to abscond and default on his bond is a contempt (*Conley v. United States*, 59 F. (2d) 929 (C. C. A. 8th)). The Court of Appeals for the Second Circuit has said that "a person might so interpose between client and attorney as to obstruct justice; for instance, he might kidnap the attorney on the eve of trial", although holding that leaflets which would have diverted "only a hypersensitive client . . . from the defense of his right" did not constitute a contempt (*McCann v. New York Stock Exchange*, 80 F. (2d) 211, 213). In the present case the interposition almost succeeded; and the obstruction of justice was not threatened but real. If the authorities cited do not determine the instant question, they point unerringly to the result (see Thomas, *Problems of Contempt of Court*, pp. 13-17, 53-74).

Moreover, the conduct of the petitioners amounted to a misrepresentation to the court, designed to pervert judicial action. Elmore's letter must, under the circumstances, be regarded as the act of Nye and Mayers, misrepresenting Elmore's desire, while using him as an innocent agent. Although perjury by a witness is not, as such, contu-



macious, the rule rests on the special dangers inherent in such summary control over witnesses, and the absence of need so long as the process of cross-examination is available (*Ex parte Hudgings*, 249 U. S. 378). It is recognized that falsehood may have obstructive qualities which warrant a finding of contempt (*United States v. Appel*, 211 Fed. 495 (S. D. N. Y.) approved in *Ex parte Hudgings*, *supra*; see *Clark v. United States*, 289 U. S. 1; cf. *Lord v. Veazie*, 8 How. 250, 255). In *United States v. Pendergast*, 35 F. Supp. 593 (W. D. Mo.) a court of three judges, in an opinion by Judge Otis, did not hesitate to hold contumacious the bribery of a fiduciary litigant which resulted in misrepresentations to the court culminating in a false decree. The same principle is applicable here.

2. The Misbehavior Was in the Presence of the Court or "So Near Thereto As to Obstruct the Administration of Justice"

Whether the petitioners' misbehavior was in the presence of the Court or "so near thereto as to obstruct the administration of justice" presents a more serious question, but we think that the answer is the same. We do not doubt that the original Act of March 2, 1831 (Appendix, *infra*, pp. 44-45), enacted following the failure of the impeachment of Judge Peck, intended the quoted words as a genuine limitation on the power to punish contempts summarily. The second section of the statute, defining obstructive crimes punishable



upon indictment in the ordinary course, makes this perfectly clear.<sup>10</sup> The point of the distinction thus drawn between contempts punishable summarily and contumacious offenses which are ordinary crimes survives in the present statutes. Section 1 of the Act of 1831 has, with a formal change (see *Savin, Petitioner*, 131 U. S. 267, 276) come down as Section 268 of the Judicial Code. Section 2 of the Act has, with substantial changes, survived in Section 135 of the Criminal Code (U. S. C., Title 18, Sec. 241) (Appendix, *infra*, p. 45), where it is combined with the Act of June 10, 1872, c. 420 (17 Stat. 378). See Rev. Stat. Secs. 5399, 5404. Under the present statutes, as under the original Act, the problem is to classify contumacious behavior into that which may be dealt with summarily by the Court and that which can only be prosecuted in the ordinary course. That the two categories are not mutually exclusive was settled in *Savin, Petitioner*, 131 U. S. 267.

An early dictum said that in misbehavior cases the power of summary punishment can only be exercised to insure order and decorum in court (*Ex parte Robinson*, 19 Wall. 505, 511). This view was abandoned in *Savin, Petitioner*, 131 U. S. 267, 277, and *Cuddy, Petitioner*, 131 U. S. 280, in which the concept of judicial presence was expanded be-

<sup>10</sup> See Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts*, 37 Harv. L. Rev. 1010, 1036-1038. cf. Thomas, *Problems of Contempt of Court*, pp. 21-27, 53-74.

yond its literal meaning, although the significance of the old criterion for cases outside the "presence" was specifically reserved (131 U. S. at 278). In *Toledo Newspaper Co. v. United States*, 247 U. S. 402, the order and decorum test was surrendered both by the majority of the Court and by the dissent. See also *Sinclair v. United States*, 279 U. S. 749, 764-765. It was also made clear that the language is not to be "spatially construed" (L. Hand, J. in *McCann v. New York Stock Exchange*, 80 F. (2d) 211, 213 (C. C. A. (2d)). But cf. *Call v. United States*, 8 F. (2d) 20 (C. C. A. 1st)). In holding contumacious a publication critical of a judge in a pending case, the Court states the only test to be "the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty" (247 U. S. at 419). The dissent of Mr. Justice Holmes, in which Mr. Justice Brandeis concurred, advanced a narrower rule. The words of the statute, they said,

point only to the present protection of the Court from actual interference, and not to postponed retribution for lack of respect for its dignity \* \* \*. Without invoking the rule of strict construction—I think that "so near as to obstruct" means so near as actually to obstruct—and not merely near enough to threaten a possible obstruction. "So near as to" refers to an accomplished fact, and the word "misbehavior" strengthens the construction I adopt. Mis-

behavior means something more than adverse comment or disrespect" (247 U. S. at 423).

In the present case, we need not rely upon the broad scope of the majority opinion, which has been said to obliterate the statutory distinction between contempts to be treated summarily and those which can only be true crimes (see Frankfurter and Landis, *op. cit.*, 37 Harv. L. Rev. 1010 at 1037). The historically vexatious problem of contempt by publication (see Fox, *Contempt of Court*, 5-43; Laski, *Constructive Contempt in England*, 41 Harv. L. Rev. 1031) is not involved. The petitioners' conduct can claim no privilege in traditional freedom, in the dangers of summary punishment for speech or in the values inherent in criticism of the judicial as well as the other branches of the government (cf. Mr. Justice Holmes dissenting in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 422, and *Craig v. Hecht*, 263 U. S. 255, 280). There is no doubt that they were guilty of "misbehavior." When these aspects of the dissenting opinion in the *Toledo* case are put aside, we think the test which it lays down applies. A court without plaintiffs cannot do business as a court (cf. *United States v. Shipp*, 203 U. S. 563). And while the petitioners' effort to eliminate Elmore as a plaintiff ultimately failed, there was on actual obstruction of the administration of justice, necessitating long delay and large expense until Elmore's action in the District Court



could go on. Moreover, the petitioners' conduct culminated in the letter which they had Elmore send to the judge and which was received by him. If, as we contend (*supra*, pp. 34-35) the letter was a false representation to the court which was itself contumacious, it is undeniable that the misbehavior occurred in the actual presence of the court (cf. *Cooke v. United States* 267 U. S. 517; *United States v. Pendergast*, 35 F. Supp. 593, 596-597 (W. D. Mo.); *Keeney v. United States*, 17 F. (2d) 976, 978 (C. C. A. 7th); *Bowles v. United States*, 50 F. (2d) 848 (C. C. A. 4th), certiorari denied, 284 U. S. 648. See also *Sinclair v. United States*, 279 U. S. 749, 764-765).

Petitioners also argue that the evidence was insufficient to support the finding on the crucial point that they exerted undue influence upon Elmore. We do not relate the evidence in detail, since the petitioners statement makes clear that the most they can establish is that it was in genuine conflict (cf. *Bessette v. Conkey*, 194 U. S. 324, 338; *Oates v. United States*, 233 Fed. 201, 206 (C. C. A. 4th), certiorari denied, 242 U. S. 633).

#### IV

THE TRIAL COURT WAS NOT DEPRIVED OF JURISDICTION  
BY THE DELAY IN FILING A VERIFICATION OF THE  
MOTION FOR ORDER TO SHOW CAUSE

There is clearly no merit in petitioners' contention that the District Court was without jurisdic-



tion because the verification was filed a week after the motion for order to show cause. The petitioners were not attached on the basis of the motion. It may be doubted, therefore, whether an affidavit was necessary at all (cf. *Creekmore v. United States*, 237 Fed. 743 (C. C. A. 8th), certiorari denied, 242 U. S. 646). In any event, the petitioners appeared and raised no objection on this score until November 17, 1939, more than two weeks after the case had been tried and the evidence heard (R. 15-16). Under these circumstances the Circuit Court of Appeals properly held that the petitioners "waived the defect by their participation in the proceeding, even if it be supposed that the filing of an affidavit on October 7 was too late." (R. 171.) *Sona v. Aluminum Castings Co.*, 214 Fed. 936, 938-941 (C. C. A. 6th), and authorities there cited; *In re Odum*, 133 N. C. 250; *People v. Severinghaus*, 313 Ill. 456 (1924); see *Aaron v. United States*, 155 Fed. 833, 836 (C. C. A. 8th, 1907); *Morehouse v. Giant Powder Co.*, 206 Fed. 24, 27 (C. C. A. 9th, 1913).

It may be noted in addition that the principal allegations on which the rule to show cause was issued had actually been sworn to by Elmore on September 29, 1939, prior to the issuance of the rule, in his testimony on the motion to dismiss his suit against the BC Remedy Company. Elmore's testimony was embodied practically verbatim in

Guthrie's motion (R. 10). The motion also referred to testimony previously given by Nye to the effect that he had employed Timberlake, the attorney who prepared the letter and final account for Elmore. The order to show cause itself shows that it was issued on the basis of sworn testimony (R. 8). To a considerable extent, also, the controlling facts were within the personal knowledge of the judge, e. g. the appointment of Guthrie to represent Elmore, the receipt of the letter which the respondents caused Elmore to write to the judge and to Guthrie, the delays in the principal suit which resulted from these letters. Under these circumstances, the court might have issued the rule to show cause *sua sponte*, without any petition or motion. The respondents were entitled to be advised of the nature of the charge against them and to be given a fair opportunity to defend. *Savin, Petitioner*, 131 U. S. 267; *Camarota v. United States*, 111 F. (2d) 243, 246 (C. C. A. 3d, 1940), certiorari denied, 85 L. Ed. 60; see *Aaron v. United States*, *supra*; *Morehouse v. Giant Powder Co.*, *supra*. They do not contend that these rights were denied.

## V

### THE JUDGMENT OF CONTEMPT DID NOT FALL WITH THE SETTLEMENT OF ELMORE'S ACTION FOR WRONGFUL DEATH

Petitioners argue that the settlement of Elmore's action for wrongful death, pending this

appeal, requires the judgment of contempt to be set aside. Their contention rests upon the premise that the contempt was civil (see *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 452) and, as we have shown, the premise is unsound.

#### CONCLUSION

We respectfully submit that neither the Circuit Court of Appeals nor this Court has jurisdiction to review the judgment of the District Court; and that the writ of certiorari should therefore be dismissed or, in the alternative, the judgment should be reversed with direction to the Circuit Court of Appeals to dismiss the appeal. In the event that there is jurisdiction, the judgment of the Circuit Court of Appeals should be affirmed.

✓ FRANCIS BIDDLE,

*Solicitor General.*

✓ WENDELL BERGE,

*Assistant Attorney General.*

✓ HERBERT WECHSLER,

✓ LOUIS B. SCHWARTZ,

*Special Assistants to the Attorney General.*

MARCH 1941.



## APPENDIX

The Act of March 8, 1934, c. 49, 48 Stat. 399 (U. S. C., Title 28, Sec. 723a), insofar as material, provides:

That the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States. \* \* \*

SEC. 2. The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

Act of February 13, 1925, c. 229, 43 Stat. 936, as amended:

SEC. 8 (c). No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree (U. S. C., Title 28, Sec. 230).

### Judicial Code:

SEC. 268. *Administration of oaths; contempts.*—The said courts shall have power to impose and administer all necessary



oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts (U. S. C., Title 28, Sec. 385).

Act of March 2, 1831, c. 99, 4 Stat. 487 provides:

That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transaction, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ process, order, rule, decree, or command of the said courts.

SEC. 2. *And be it further enacted*, That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or

impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence.

Criminal Code, Section 135 (U. S. C., Title 18, Sec. 241).

Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than \$1,000, or imprisoned not more than one year, or both (R. S. §§ 5399, 5404; Mar. 4, 1909, c. 321, § 135, 35 Stat. 1113).

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# SUPREME COURT OF THE UNITED STATES:

No. 558.—OCTOBER TERM, 1940.

R. H. Nye and L. C. Mayers, Petitioners, vs. The United States of America and W. B. Guthrie.	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
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[April 14, 1941.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

Petitioners were adjudged guilty of contempt under § 268 of the Judicial Code (36 Stat. 1163, 28 U. S. C. § 385) for their efforts to obtain a dismissal of a suit brought by one Elmore in the federal District Court for the Middle District of North Carolina. Elmore, administrator of the estate of his son, brought that action, *in forma pauperis*, against one Council and Bernard, partners, trading as B. C. Remedy Co., and alleged that his son died as a result of the use of a medicine, known as B. C. and manufactured and sold by them. The court appointed William B. Guthrie to represent Elmore. Defendants filed an answer April 29, 1939. On April 19, 1939, Elmore notified the District Judge and his lawyer by letters that he desired to have the case dismissed. The substance of the episode involving the improper conduct of petitioners was found as follows: Elmore is illiterate, and feeble in mind and body. Petitioners,<sup>1</sup> through the use of liquor and persuasion, induced Elmore to seek a termination of the action. Nye directed his own lawyer to prepare the letters to the District Judge and to Guthrie and to prepare a final administration account to be filed in the local probate court. Nye took Elmore to the probate court, had him discharged as administrator, and paid the clerk a fee of \$1. He then took Elmore to the postoffice, registered the letters and paid the postage. Elmore, however, was not promised or paid anything.

<sup>1</sup> Nye's daughter was married to the son of Council, one of the defendants in the Elmore action. Mayers (Meares) was Nye's tenant who was acquainted with Elmore.

These events took place more than 100 miles from Durham, North Carolina, where the District Court was located.

On September 30, 1939, Guthrie filed a motion<sup>2</sup> asking for an order requiring Nye to show cause "why he should not be attached and held as for contempt of this Court".<sup>3</sup> The court issued a show cause order to Nye and Mayers who filed their answers. There was a hearing. Evidence was introduced and argument was heard on motions to dismiss. The court found that the writing of the letters and the filing of the final account were procured by Nye "for the express and definite purpose of preventing the prosecution of the civil action in the federal court and with intent to obstruct and to prevent the trial of the case on its merits"; and that the conduct of Nye and Mayers "did obstruct and impede the due administration of justice in this cause; that the conduct has caused a long delay, several hearings and enormous expense." It accordingly held that their conduct was "misbehavior so near to the presence of the court as to obstruct the administration of justice" and adjudged each guilty of contempt. It ordered Nye to pay the costs of the contempt proceedings, including \$500 to Guthrie, and a fine of \$500; and it ordered Mayers to pay a fine of \$250. The District Court filed its finding of facts and judgment on February 8, 1940. On March 16, 1940, petitioners filed a notice of appeal from the judgment.<sup>4</sup> The Circuit Court of Appeals affirmed that judg-

<sup>2</sup> The court had deferred action on Elmore's inspired request for a dismissal at the request of Guthrie and pending an investigation by him. On July 20, 1939, Nye and Elmore's son were examined under oath before the court as to the episode. On August 29, 1939, defendants moved to dismiss Elmore's action on the ground that he had been discharged as administrator. A hearing was held on that motion and Elmore testified respecting his discharge. The evidence so adduced was the basis of the motion for an order to show cause on September 30, 1939.

<sup>3</sup> The motion for an order to show cause also prayed: "2. That the Court call to the attention of the United States District Attorney for this district the entire record in this cause with request to the said United States District Attorney to investigate the question as to whether or not a conspiracy was entered into by and between R. H. Nye, W. E. Timberlake and L. G. Mayers, all of Robeson County, North Carolina, to defeat the administration of justice and the orderly process of this Court and further as to whether or not they have been guilty of subornation of perjury and further whether they conspired to practice a fraud and did practice a fraud upon this Court. 3. That this matter through the office of the United States District Attorney for this district be submitted and inquired into by the Grand Jury for such action and attention the Grand Jury shall deem proper. 4. For such other and further procedure as to this Court may seem proper."

<sup>4</sup> On March 15, 1940, Elmore, with the assent of Guthrie, submitted to a judgment of voluntary non-suit in the action for wrongful death upon payment of a "substantial sum".

ment.<sup>5</sup> 113 F. (2d) 1006. We granted the petition for certiorari because the interpretation of the power of the federal courts under § 268 of the Judicial Code to punish contempts raised matters of grave importance.

We are met at the threshold with a question as to the jurisdiction of the Circuit Court of Appeals over the appeal. The government concedes that if this was a case of civil contempt, the notice of appeal was effective under Rule 73 of the Rules of Civil Procedure. It argues, however, that the contempt was criminal—in which case the appeal was not timely if the Criminal Appeals Rules govern,<sup>6</sup> and not made in the proper form if § 8(c) of the Act of February 13, 1925 (43 Stat. 936, 940, 45 Stat. 54, 28 U. S. C. § 230) is applicable.<sup>7</sup>

We do not think this was a case of civil contempt. We recently stated in *McCrone v. United States*, 307 U. S. 61, 64, “While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public.” The facts of this case do not meet that standard. While the proceedings in the District Court were entitled in Elmore’s action and the United States was not a party until the appeal, those circumstances though relevant (*Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 445-446) are not conclusive as to the nature of the contempt. The fact that Nye was ordered to pay the costs of the proceeding, including \$500 to Guthrie, is also not decisive. As Mr. Justice Brandeis stated in *Union Tool Co. v. Wilson*, 259 U. S. 107, 110, “Where a fine is imposed partly as compensation to the complainant and partly as punishment, the criminal feature of the

<sup>5</sup>The United States was made a party when the case was docketed in the Circuit Court of Appeals. It entered its appearance but its attorneys apparently took no further part in the proceedings in that court.

<sup>6</sup>Promulgated May 7, 1934. Rule III provides that an appeal shall be taken within five days after entry of judgment of conviction or of an order denying a motion for new trial. In the present case, the notice of appeal was filed more than a month after the judgment of the District Court. In case the Criminal Appeals Rules govern, the government also points out that Rule XI requires that petitions for certiorari to review a judgment of the appellate court shall be made within thirty days after the entry of judgment of that court. In the present case the petition for a writ of certiorari was filed about two months after the judgment of the Circuit Court of Appeals.

<sup>7</sup>“No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.”



order is dominant and fixes its character for purposes of review." The order imposes unconditional fines payable to the United States. It awards no relief to a private suitor. The prayer for relief<sup>8</sup> and the acts charged<sup>9</sup> carry the criminal hallmark. Cf. *Gompers v. Bucks Stove & Range Co.*, *supra*, p. 449. They clearly do not reveal any purpose to punish for contempt "in aid of the adjudication sought in the principal suit". *Lamb v. Cramer*, 285 U. S. 217, 220. When there is added the "significant" fact (*Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 329) that Nye and Mayers were strangers, not parties, to Elmore's action, there can be no reasonable doubt that the punitive character of the order was dominant.

We come then to the question of the jurisdiction of the Circuit Court of Appeals. We disagree with the government in its contention that the appeal in this case was governed by the Criminal Appeals Rules. Those rules were promulgated pursuant to the provisions of the Act of March 8, 1934 (48 Stat. 399; 28 U. S. C. § 723a) which provided, *inter alia*, that this Court should have "the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases." The rules were adopted "as the Rules of Practice and Procedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, in criminal cases." 292 U. S. 661. In this case there was no plea of guilty, there was no verdict of guilt by a jury, and there was no finding of guilt by the court where a jury was waived. To be sure, the rules and the Act are applicable "in criminal cases". But we do not agree with the government that the qualifying language of the rules designates merely the stage of the proceedings "in criminal cases" when the rules become applicable. It is our view that the rules describe the kinds of cases to which they are to be applied. The Act of March 8, 1934 amended the Act of February 24, 1933 (47 Stat. 904) which gave this Court rule-making power "with respect to any or all proceedings after verdict in criminal cases." The legislative history makes it abundantly clear

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<sup>8</sup> *Supra*, note 3.

<sup>9</sup> On October 30, 1939, the District Court denied motions to dismiss the rule to show cause, saying that "the question to be determined is whether the respondents, or either of them, is guilty of misbehavior in the presence of the Court, or so near thereto to obstruct the administration of justice in this Court, and that is a matter of fact to be determined by the evidence and not on motion."



that the amendment in 1934, so far as material here, was made because "it would not seem to be desirable that there should be different times and manner of procedure in cases of appeal where there is a verdict of a jury as distinguished from cases in which there is a finding of guilt by the court on the waiver of a jury." H. Rep. No. 858, 73d Cong., 2d Sess., p. 1; S. Rep. No. 257, 73d Cong., 2d Sess., p. 1. In light of this history and the language of the order promulgating the rules we conclude that the categories of cases embraced in the rules cannot be expanded by interpretation to include this type of case.

That conclusion means that this appeal was governed by § 8(c) of the Act of February 13, 1925. The court is equally divided in opinion as to whether the Circuit Court of Appeals, in absence of an application for allowance of the appeal, had the power to decide the case on the merits. Hence the action of that court in taking jurisdiction over the appeal is affirmed.

We come then to the merits.

The question is whether the conduct of petitioners constituted "misbehavior . . . so near" the presence of the court "as to obstruct the administration of justice" within the meaning of § 268 of the Judicial Code.<sup>10</sup> That section derives from the Act of March 2, 1831 (4 Stat. 487). The Act of 1789 (1 Stat. 73, 83) provided that courts of the United States "shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." Abuses arose,<sup>11</sup> culminating in impeachment proceedings against James H. Peck, a federal district judge, who had imprisoned and disbarred one Lawless for publishing a criticism of one of his opinions in a case which was on appeal. Judge Peck was acquitted.<sup>12</sup> But the history of that episode makes abundantly clear that it served as the occasion for a drastic delimitation by Congress

<sup>10</sup> This section provides: "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

<sup>11</sup> See Nelles & King, *Contempt by Publication in the United States*, 28 Col. L. Rev. 401, 409 *et seq.*

<sup>12</sup> Stansbury, *Report of the Trial of James H. Peck* (1833).

of the broad undefined power of the inferior federal courts under the Act of 1789.

The day after Judge Peck's acquittal Congress took steps to change the Act of 1789. The House directed its Committee on the Judiciary "to inquire into the expediency of defining by statute all offences which may be punished as contempts of the courts of the United States, and also to limit the punishment for the same."<sup>13</sup> Nine days later James Buchanan brought in a bill which became the Act of March 2, 1831. He had charge of the prosecution of Judge Peck and during the trial had told the Senate:<sup>14</sup> "I will venture to predict, that whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim." The Act of March 2, 1831, "declaratory of the law concerning contempts of court," contained two sections, the first of which provided:

"That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

Sec. 2 of that Act, from which § 135 of the Criminal Code<sup>15</sup> (35 Stat. 1113, 18 U. S. C. § 241) derives, provided:

"That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, wit-

<sup>13</sup> 7 Cong. Deb., 21st Cong., 2d Sess., Feb. 1, 1831, Col. 560-561. And see House Journal, 21st Cong., 2d Sess., p. 245.

<sup>14</sup> Stansbury, *op. cit.*, p. 430.

<sup>15</sup> That section presently provides: "Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

ness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence."

In 1918 this Court in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 418, 419, stated that "there can be no doubt" that the first section of the Act of March 2, 1831 "conferred no power not already granted and imposed no limitations not already existing"; and that it was "intended to prevent the danger, by reminiscence of what had gone before, of attempts to exercise a power not possessed which . . . had been sometimes done in the exercise of legislative power." The inaccuracy of that historic observation has been plainly demonstrated. Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010. Congress was responding to grievances arising out of the exercise of judicial power as dramatized by the Peck impeachment proceedings. Congress was intent on curtailing that power. The two sections of the Act of March 2, 1831 when read together, as they must be, clearly indicate that the category of criminal cases which could be tried without a jury was narrowly confined. That the previously undefined power of the courts was substantially curtailed by that Act was early recognized by lower federal courts. *United States v. Holmes*, Fed. Cas. No. 15,383, at p. 363; *Ex parte Poulson*, Fed. Cas. No. 11,350; *United States v. New Bedford Bridge*, Fed. Cas. No. 15,867, at p. 104; *United States v. Seeley*, Fed. Cas. No. 16,248a; *United States v. Emerson*, 4 Cranch (C. C.) 188; *Kent's Commentaries* (3rd ed. 1836) pp. 300-301. And when the Act came before this Court in *Ex parte Robinson*, 19 Wall. 505, 511, Mr. Justice Field, speaking for the Court, acknowledged that it had limited the power of those courts. And see *Ex parte Bradley*, 7 Wall. 364, 374. So far as the decisions of this Court are concerned, that view persisted to the time when *Toledo Newspaper Co. v. United States*, *supra*, was decided. See *Ex parte Wall*, 107 U. S. 265; *Savin, Petitioner*, 131 U. S. 267, 276; *Cuddy, Petitioner*, 131 U. S. 280, 285; *Eilenbecker v. District Court*, 134 U. S. 81, 38.



Mindful of that history, we come to the construction of § 268 of the Judicial Code in light of the specific facts of this case. The question is whether the words "so near thereto" have a geographical or a causal connotation. Read in their context and in the light of their ordinary meaning, we conclude that they are to be construed as geographical terms. In *Ex parte Robinson*, *supra*, at p. 511, it was said that as a result of those provisions the power to punish for contempts "can only be exercised to insure order and decorum" in court. "Misbehavior of any person in their presence" plainly falls in that category. *Ex parte Terry*, 128 U. S. 289. And in *Savin, Petitioner*, *supra*, it was also held to include attempted bribes of a witness, one in the jury room and within a few feet of the court room and one in the hallway immediately adjoining the court room. See *Cooke v. United States*, 267 U. S. 517. The phrase "so near thereto as to obstruct the administration of justice" likewise connotes that the misbehavior must be in the vicinity of the court. *Nelles & King, Contempt by Publication in the United States*, 28 Col. L. Rev. 525, 530. It is not sufficient that the misbehavior charged has some direct relation to the work of the court. "Near" in this context, juxtaposed to "presence", suggests physical proximity not relevancy. In fact, if the words "so near thereto" are not read in the geographical sense, they come close, as the government admits, to being surplusage. There may, of course, be many types of "misbehavior" which will "obstruct the administration of justice" but which may not be "in" or "near" to the "presence" of the court. Broad categories of such acts, however, were expressly recognized in § 2 of the Act of March 2, 1831 and subsequently in § 135 of the Criminal Code. It has been held that an act of misbehavior though covered by the latter provisions may also be a contempt if committed in the "presence" of the Court. *Savin, Petitioner*, *supra*. And see *Sinclair v. United States*, 279 U. S. 749. Yet in view of the history of those provisions, meticulous regard for those separate categories of offenses must be had, so that the instances where there is no right to jury trial will be narrowly restricted. If "so near thereto" be given a causal meaning, then § 268 by the process of judicial construction will have regained much of the generality which Congress in 1831 emphatically intended to remove. See Thomas, *Problems of Contempt of*



Court (1934) c. VII. If that phrase be not restricted to acts in the vicinity of the court but be allowed to embrace acts which have a "reasonable tendency" to "obstruct the administration of justice" (*Toledo Newspaper Co. v. United States, supra*, p. 421) then the conditions which Congress sought to alleviate in 1831 have largely been restored. See Fox, *The History of Contempt of Court* (1927) c. IX. The result will be that the offenses which Congress designated as true crimes under § 2 of the Act of March 2, 1831 will be absorbed as contempts wherever they may take place. We cannot by the process of interpretation obliterate the distinctions which Congress drew.

We are dealing here only with a problem of statutory construction, not with a question as to the constitutionally permissible scope of the contempt power. But that is no reason why we should adhere to the construction adopted by *Toledo Newspaper Co. v. United States, supra*, and leave to Congress the task of delimiting the statute as thus interpreted. Though the statute in question has been on the books for over a century, it has not received during its long life the broad interpretation which that decision gave it. Rather, that broad construction is relatively recent. So far as decisions of this Court are concerned, the statute did not receive any such expanded interpretation until *Toledo Newspaper Co. v. United States, supra*, was decided in 1918. The decisions of this Court prior to 1918 plainly recognized, as we have noted, that Congress through the Act of March 2, 1831 had imposed a limitation on the power to punish for contempts—a view consistent with the holdings of the lower federal courts during the years immediately following the enactment of the statute. The early view was best expressed in *Ex parte Poulson, supra*, decided in 1835. In that case it was held that the Act of March 2, 1831 gave the court no power to punish a newspaper publisher for contempt for publishing an "offensive" article relative to a pending case. It was held that the first section of the Act "alludes to that kind of misbehavior which is calculated to disturb the order of the court, such as noise, tumultuous or disorderly behavior, either in or so near to it as to prevent its proceeding in the orderly dispatch of its business." p. 1208. That was a plain recognition that the words "so near thereto" connoted physical proximity. And prior to 1918 the decisions of this Court did not depart from that theory,

however they may have expanded the earlier notions of "misbehavior". To be sure, the lower federal courts in the intervening years had expressed a contrariety of views on the meaning of the statute<sup>16</sup> and some were giving it an expanded scope<sup>17</sup> which was later approved in *Toledo Newspaper Co. v. United States*, *supra*. But it is significant that not until after the turn of this century did the first line of fracture appear suggesting that the statute authorized summary punishment for publication.<sup>18</sup> Thus the legislative history of this statute and its career demonstrate that this case presents the question of correcting a plain misreading of language and history so as to give full respect to the meaning which Congress unmistakably intended the statute to have. Its legislative history, its interpretation prior to 1918, the character and nature of the contempt proceedings admonish us not to give renewed vitality to the doctrine of *Toledo Newspaper Co. v. United States*, *supra*, but to recognize the substantial legislative limitations on the contempt power which were occasioned by the Judge Peck episode. And they necessitate an adherence to the original construction of the statute so that, unless its requirements are clearly satisfied, an offense will be dealt with as the law deals with the run of illegal acts. Cf. Mr. Justice Holmes dissenting in *Toledo Newspaper Co. v. United States*, *supra*, pp. 422 *et seq.*

The conduct of petitioners (if the facts found are taken to be true) was highly reprehensible. It is of a kind which corrupts the judicial process and impedes the administration of justice. But the fact that it is not reachable through the summary procedure of contempt does not mean that such conduct can proceed with impunity. Sec. 135 of the Criminal Code, a descendant of § 2, of the Act of March 2, 1831, embraces a broad category of offenses. And certainly it cannot be denied that the conduct here in question

<sup>16</sup> That "so near thereto" is a geographical term see *Ex parte Schulenburg*, 25 Fed. 211, 214 (1885); *Hillmon v. Mutual Life Ins. Co.*, 79 Fed. 749 (1897); *Morse v. Montana Ore-Purchasing Co.*, 105 Fed. 337, 347 (1900); *Cuyler v. Atlantic & N. C. R. Co.*, 131 Fed. 95 (1904). And see *Nelles & King, op. cit.*, pp. 532, 539-542.

<sup>17</sup> For cases expanding the concept of "presence" and "so near thereto" see *In re Brule*, 71 Fed. 943 (1895); *McCaully v. United States*, 25 App. D. C. 404 (1905); *United States v. Zavalo*, 177 Fed. 536 (1910); *Kirk v. United States*, 192 Fed. 273 (1911); *In re Independent Pub. Co.*, 228 Fed. 787 (1915).

<sup>18</sup> *Nelles & King, op. cit.*, p. 539 citing *Ex parte McLeod*, 120 Fed. 130 (1903) and *United States v. Huff*, 206 Fed. 700 (1913).

comes far closer to the family of offenses there described than it does to the more limited classes of contempts described in § 268 of the Judicial Code. The acts complained of took place miles from the District Court. The evil influence which affected Elmore was in no possible sense in the "presence" of the court or "near thereto". So far as the crime of contempt is concerned, the fact that the judge received Elmore's letter is inconsequential.

We may concede that there was an obstruction in the administration of justice, as evidenced by the long delay and large expense which the reprehensible conduct of petitioners entailed. And it would follow that under the "reasonable tendency" rule of *Toledo Newspaper Co. v. United States, supra*, the court below did not err in affirming the judgment of conviction. But for the reasons stated that decision must be overruled. The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business. Cf. *Savin, Petitioner, supra*, at p. 278. Hence, it was not embraced within § 268 of the Judicial Code. If petitioners can be punished for their misconduct, it must be under the Criminal Code where they will be afforded the normal safeguards surrounding criminal prosecutions. Accordingly, the judgment below is

*Reversed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

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# SUPREME COURT OF THE UNITED STATES.

No. 558.—OCTOBER TERM, 1940.

R. H. Nye and L. C. Mayers,  
Petitioners,  
vs.  
The United States of America, and  
W. B. Guthrie.

On Writ of Certiorari to  
the United States Circuit  
Court of Appeals for the  
Fourth Circuit.

[April 14, 1941.]

Mr. Justice STONE.

The court below did not pass on the question, mooted here, whether it acquired jurisdiction under the appeal provisions of the applicable section, 8(c) of the Jurisdictional Act of February 13, 1925. Only four members of this Court are of opinion that it did. Assuming for present purposes that it had jurisdiction to decide the merits, I think its decision was right and that the judgment below should be affirmed.

We are concerned here only with the meaning and application of an act of Congress which has stood unamended on the statute books for one hundred and ten years. It gives statutory recognition to the power of the federal courts to punish summarily for contempt and provides that that power "shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts or so near thereto as to obstruct the administration of justice".

The issue is not whether this statute has curtailed an authority which federal courts exercised before its enactment. Concededly it has. The only question before us is whether it has so limited that authority as to preclude summary punishment of the contemptuous action of petitioner which it is not denied, is "misbehavior" although not in the presence of the court, and which it is admitted seriously obstructed the administration of justice in a cause pending in the court. The question is important, for if conduct such as this record discloses may not be dealt with summarily the only recourse of a federal court for the protection of the integrity of proceedings pending before it, from acts of corruption and intima-

tion outside the court room, is to await the indictment of the offenders, with or without adjournment of the pending proceedings as the exigencies of the case may require.

It is not denied that the distance of the present contemptuous action from the court in miles did not lessen its injurious effect, and in that sense it was "near" enough to obstruct the administration of justice. The opinion of the Court supports its conclusion on the ground that "near" means only geographical nearness and so implicitly holds that no contempt is summarily punishable unless it is either in the presence of the court or is some kind of physical interference with or disturbance of its good order, so that the nearness to the court of the contemptuous act has an effect in obstructing justice which it would not have if it took place at a more distant point. From all this it seems to follow that the surreptitious tampering with witnesses, jurors or parties in the presence of the court, although unknown to it, would be summarily punishable because in its presence, but that if it took place outside the court room or while the witness, juror or party was on his way to attend court it would not be punishable because geographical nearness is not an element in making the contemptuous action an obstruction to justice.

These contentions assume that "so near thereto" can only refer to geographical position and they ignore the entire history of the judicial interpretation of the statute. "Near" may connote proximity in causal relationship as well as proximity in space, and under this statute as the opinion seems to recognize even the proximity to the court, in space, of the contemptuous action, is of significance only in its causal relationship to the obstructions to justice which result from disorder or public disturbances. This Court has hitherto, without a dissenting voice, regarded the phrase "so near thereto" as connoting and including those contempts which are the proximate cause of actual obstruction to the administration of justice, whether because of their physical nearness to the court or because of a chain of causation whose operation in producing the obstruction depends on other than geographical relationships to the court. See *Savin, Petitioner*, 131 U. S. 267; *Cuddy, Petitioner*, 131 U. S. 280; *Toledo Newspaper Company v. United States*, 247 U. S. 402; *Sinclair v. United States*, 279 U. S. 749, 764, 765; *Craig v. Hecht*, 263 U. S. 255. Cf. *McCann v. New York Stock Exchange*, 80 F. (2d) 211, 213. Contempts which obstruct justice because of their effect on

the good order and tranquillity of the court must be in the presence of the court or geographically near enough to have that effect. Contempts which are surreptitious obstructions to justice, through tampering with witnesses, jurors and the like, must be proximately related to the condemned effect. We are pointed to no legislative history which militates against such a construction of the statute.

In the *Savin*, the *Craig*, and the *Sinclair* cases, as well as in the *Toledo* case, the contempts were of this latter kind. The contempt held summarily punishable by this Court in the *Savin* case, decided sixty years ago, was the attempted bribery of a witness at a place in the court house but outside the courtroom, without any disorder or disturbance of the court. The contemptuous acts in the other cases took place at points distant from the court in the city where it sat. In all, the injurious effect on the administration of justice was unrelated to the distance from the court. In holding that they were contempts within the summary jurisdiction of the court this Court definitely decided that "so near thereto" is not confined to a spatial application where the evil effect of the alleged contempt does not depend upon its physical nearness to the court.

The *Savin* and *Sinclair* cases were decided by a unanimous court. The dissenting judges in the *Toledo* and *Craig* cases, in which the acts held to be contemptuous were the publication, at a distance from the court, of comments derogatory to the judge, made no contention that the phrase imposed a geographical limitation on the power of the court. Their position was that the particular contemptuous acts charged did not in fact have the effect of obstructing justice, a contention which cannot be urged here. In the *Toledo* case Justice Holmes said, page 423: "I think that 'so near as to obstruct' means so near as actually to obstruct and not merely near enough to threaten a possible obstruction". And in the *Craig* case, after commenting on the fact that no cause was pending before the court, he said, p. 281: "Suppose the petitioner falsely and unjustly charged the judge with having excluded him from knowledge of the facts, how can it be pretended that the charge obstructed the administration of justice. . . ." Complete agreement with the dissents in these cases neither requires the Court's decision here nor lends it any support.

I do not understand my brethren to maintain that the secret bribery, or intimidation of a witness in the court room may not be summarily punished. Cf. *Savin*, *supra*; *Sinclair*, *supra*. If so it



is only because of the effect of the contemptuous act in obstructing justice which is precisely the same if the bribery or intimidation took place outside the court house. If it may be so punished I can hardly believe that Congress, by use of the phrase "so near thereto", intended to lay down a different rule if the contemptuous acts took place across the corridor, the street, in another block, or a mile away.

If the point were more doubtful than it seems to me, I should still think that we should leave undisturbed a construction of the statute so long applied and not hitherto doubted in this Court. We recently declined to consider the contention that the Sherman Act can never apply to a labor union, because of long standing decisions of this Court to the contrary, a construction which Congress had not seen fit to change. See *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 487, 488.

In view of our earlier decisions and of the serious consequences to the administration of justice if courts are powerless to stop summarily, obstructions like the present, I think the responsibility of departing from the long accepted construction of this statute should be left to the legislative branch of the Government to which it rightfully belongs.

The CHIEF Justice and Mr. Justice ROBERTS concur in this opinion.